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CURRENT TOPICS.

THE communication which we elsewhere print, upon the subject of proposed legislation to remedy the evils resulting from defective tax-titles, deserves careful consideration. As the law now stands in most of the states, it holds out inducements to investors to purchase the property of delinquent tax-payers offered for sale by the agents of the government, and when the purchaser endeavors to assert his title in the courts, he finds that the law itself has been repealed by a course of judicial construction, technical and senseless in the last degree. The result, then, is that the state sells a man a piece of property and turns around and cheats him out of his purchase. This would not be a hardship if the state would return to him the purchase-money which he has paid, with interest; but this is not done. Courts in general hold that they possess no power to remedy the defective execution of such a power as the power of the revenue officers of the state to sell the property of a citizen for non-payment of taxes; and therefore the man who invests his money, upon the inducements held out to him by his government, not only does not get that which he bought, but his money, out of which the government has, in effect, cheated him, is withheld from him. This is rank injustice, and such examples of dishonesty held out by the state are calculated to destroy public and private morals, and bring the law itself into general contempt. When the law becomes an organized instrument of fraud, deception and plunder, the person who is defrauded, deceived and plundered naturally despises the law, and looks upon it as his enemy. But this is not all. The failure of the state, in these proceedings *in invitum* to enforce the collection of delinquent taxes, to give to the purchaser a good title, results in a general failure to collect the revenue, except out of timid people, and people sufficiently honest to pay their taxes without resistance. As to whether an adequate remedy will be found in the measure proposed by our correspondent, we would not, without further reflection, wish to express an opinion. But it seems clear that the law should be so modified that no person shall be permitted to successfully defend in a court of justice against what is known as a tax-title, without paying to the purchaser the amount of purchase-money and interest which he has paid to the government. If, then, the tax was unlawfully assessed, a remedy should be provided for the tax-payer against the government itself, to recover the amount so paid.

ONE of the events of the year, in book-making, is a digest of the criminal law of England, by Sir James Fitzjames Stephen, Q. C., which has been reproduced in this country by Messrs. Soule, Thomas & Wentworth of St. Louis, under an arrangement with the English publishers. In its general plan this book resembles Mr. Stephen's Digest of the Law of Evidence, a book which has had a great run in this country. His plan is to state the law relating to crimes and punishments, as it rests in statutes and judicial decisions, in the form of succinct definitions, and to follow this with illustrations, drawn for the most part from adjudicated cases. In this manner he seems to have completely succeeded in *codifying* the criminal law of England, and in embellishing his code with numerous illustrations and explanatory notes. Mr. Stephen does not regard his work as being a penal code. He thinks that "it may serve as a first step towards a code." His introductory chapter is replete with practical and philosophical suggestions, and is especially to be commended for the frank manner in which the author exposes many of the ridiculous rules of the common law, and the no less ridiculous statutes, which have been heaped up upon each other until they have grown into a vast mountain of rubbish. "As they stand," says Mr. Stephen, "the Consolidation Acts faithfully reflect the vagueness of the ancient common law, and the maintenance of the statute law by which its gaps were filled up. When Sir William Coventry's nose was slit as an act of revenge, an act (22 & 23 Car. 2, c. 1) was passed which made it felony to slit people's noses. When a band of deer-stealers in Waltham Chase (called the Waltham Blacks, from their habit of blacking their faces) committed a series of offenses against keepers and others, an act was passed (9 Geo. 1, c. 22) which made it felony to inflict various specific kinds of bodily injury, and it was so drawn as to make it doubtful whether it was not a necessary element of the offense that the offender should have his face blacked, or be otherwise disguised. When, in our own day, a certain number of criminals garroted people in the streets of London, an act was passed providing that persons who garroted their neighbors should be subjected to a punishment not inflicted for other crimes of a similar description. It is in this piecemeal manner that our statute law on the subject of crime has grown up, and one of the most important improvements which could be made by a Penal Code would consist in reducing it to some sort of order and system." These remarks would not apply to the criminal law of the American states in the same degree; but no doubt our criminal statutes are open to some extent to the same criticisms. While we can not think that this book will be of great use to the American practitioner, yet it will be a book of the greatest interest in the hands of every lawyer who thinks.

AMONG the statements which Judge Robinson, sitting in a court in New York city, is reported to have made in regard to excessive legal fees, is that many ex-judges of the courts sit as official referees, and habitually charge for their services at the rate of ten dollars per sitting of two-and-a-half hours. Besides this, they get

a large additional fee, where the case is of such importance as to require the preparation of an opinion on questions of law. Judge Robinson did not, we presume, suggest that these ex-judges were not as able lawyers as the judges who occupy seats on the bench of that city. In the last number of the *Albany Law Journal* the salaries which the latter receive are stated as follows: "The Surrogate of New York County receives $12,000 a year, and the Surrogate of Kings County $10,000 a year; the Surrogates of Albany, Rensselaer, Monroe and Westchester each $4,000; those of Oneida and Onondaga each $3,500. The Surrogate of Erie County receives $4,500 a year, while the Surrogates of the other counties receive salaries varying from $3,000 to $1,500. Each of the judges of the Marine Court of the city of New York receives a salary of $10,000 a year, and the Recorder, City Judge and the Judge of the General Sessions of the city of New York each receive $12,000 a year. The judges of the Superior Court of the city of New York and of the Court of Common Pleas for the county of New York each receive a salary of $15,000 a year. The judges of the District Court in New York receive each $6,000 a year, and the police justices each receive $8,000 a year. The judges of the Supreme Court in New York receive $17.500 a year each." We have not the pleasure of knowing in which of the courts of New York city Judge Robinson sits; but assuming that he gets $12,000 a year, and that there are 300 working days in a year (which there are not), this would make his salary stand at the handsome figure of $40 per day, with office rent and clerk hire thrown in. This is twice as much as the ex-judges receive for their services as referees; and besides, they have to pay their own office expenses, including clerks, messengers, etc.

Twenty dollars a day is certainly not too much for the services of a referee in a case of importance, and in a city, where the cost of living is as high as in New York, it is not enough. The referee system is undoubtedly liable to abuse on account of excessive fees; but its greatest danger lies in another direction. A referee sometimes finds himself unconsciously sitting as a judge in his own case. His fees are to be taxed and collected as costs in the suit. Suppose, then, that the plaintiff is solvent and the defendant insolvent, he is under a direct temptation to decide in favor of the latter, knowing that if the judgment goes against the insolvent party, he, the referee, will lose all compensation for his services. It may be said that it is a low view to take of the morals of the legal profession to suppose that any lawyer would be influenced by such considerations. But human nature is weak at best, and ought not to be subjected to such temptations. No officer who is called upon to act judicially should receive a fee dependent upon the event of the litigation. This might be avoided in the case of referees by a statute providing that in all cases, before a referee files his report, he shall be entitled to demand and receive his fees of the party in whose favor his report is, and that any dispute as to such costs shall be determined by the court before such report is filed.

MORTGAGE—HOMESTEAD.

POWER OF EQUITY TO COMPEL MORTGAGEE TO RESORT TO PROPERTY OTHER THAN THE HOMESTEAD.

In *Searle* v. *Chapman*, 101 Mass., s. c. 4 Am. L. T. Rep. 386, the question was considered whether a court of equity, in foreclosing a mortgage which embraces both the mortgagor's homestead and other property not impressed with the homestead character, will compel the mortgagee to resort, in the first instance, to that portion of the mortgaged premises not occupied and claimed as the homestead, where the deed of mortgage in which the wife has joined, contains a release of the homestead privilege. The owner of the equity of redemption offered evidence tending to prove that the premises were of sufficient value to satisfy the mortgage debt, without resorting to that part which would be set-off as the homestead; and asked the judge to rule that so much of the premises, including the house where the tenants live, of the value of $800, could not be taken by the mortgagee, in case the other property included in the mortgage was sufficient to satisfy the mortgage debt. But the court below declined so to rule, and in so doing, was sustained by the supreme judicial court. In giving judgment in the latter court, Gray, Ch. J., said: "The mortgage-deed having been, as was admitted at the argument, executed by the husband and wife in due form to release all rights of dower and of homestead, these rights, as well as every other title of the husband in the premises, passed to the mortgagee, and were equally liable to him for the payment of the mortgage, and could not be set up either as a ground for redemption or as against a foreclosure, except upon the terms of paying the whole mortgage debt. The power of a court of chancery to compel a mortgagee to resort, in the first instance, to one of several estates mortgaged, is exercised only for protection of the equities of different creditors or incumbrancers, or of sureties, and not for the benefit of the mortgagor. As against him the mortgagee has the right to enforce the contract between them according to its terms, and is not obliged to elect between different remedies or securities. 1 Story Eq. Jur. §§ 640, 645. The right of homestead, created by our statutes, is certainly entitled to no higher degree of favor than the courts have always accorded to the common law right of dower. The case can not be distinguished in principle from the ordinary one in which a wife who has joined by way of releasing dower in the mortgage of her husband, is held to pay the whole mortgage debt, as a condition of asserting her right of dower as against the mortgagee. Gibson v. Crehore, 5 Pick. 146, 152; McCabe v. Bellows, 7 Gray, 148, and 1 Allen, 269; Davis v.

Wetherell, 13 Allen, 60. The judgment in Pittman's Appeal, 48 Penn. St. 315, is in accordance with our conclusion. The cases in some of the western states, cited by the learned counsel for the tenants, so far as they countenance any equity in the owner of a right of homestead as against a party in whose favor he has released or waived it, are supported by no reasons, and do not disclose how far they may have been influenced by local statutes."

Pittman's Appeal, 48 Penn. St. 315, above referred to, was as follows: There were eight judgments against the debtor, on two of which, the second and fourth, there was a waiver of the benefits of the homestead law, which waivers are held valid in Pennsylvania. Under these judgments the debtor's real estate was sold, and he claimed $300, the limit of the execution allowed by law, out of the proceeds. The court say: "The effect of admitting the debtor to the distribution is to divide the fund into two parts, one of which belongs to him, the others to his judgment-creditors generally. By virtue of the waiver in favor of the second and fourth judgment-creditors, they have a lien on both funds; the other judgment-creditors on only one. Two of several creditors of a common debtor having a lien on two funds, and the other creditors a lien on but one, presents the ordinary case in equity in which the two creditors would be compelled to take the fund that the other creditors could not touch, and leave to these the other fund unimpaired, or no more impaired than would be necessary to complete the satisfaction due to the two creditors. There is no doubt about this equitable principle; and seeing that the debtor's voluntary act invited its application, we feel no hesitation in applying it. It is argued that the debtor's rights under the statute ought not to be construed away. Certainly not, if he leave them where the statute expected to find them. The statute exempted $300 worth of his property from levy and sale on the execution of *any* creditor after the 4th of July, 1849; but this debtor, by releasing the right to two of his creditors, sought to transfer property to them to the prejudice of other creditors. This was never contemplated by the statute. The system of preference and distribution established by other statutes, was not intended to be broken up by the exemption law; and we prevent all clashing between the statutes when we annex to the debtor's waiver its natural and legal consequences. It is not for him to make distribution of his estate among judgment-creditors, the law having fixed that. He may, if he will, keep for himself and family the designated portion; but if he will not, it must, like the rest of his estate, take the course the law has prescribed. No man can set up his private will above the law. Declining the legislative bounty, he can not alter the statutes of distribution."

This court adopts the rule laid down by the same court in the previous case of Shelly's Appeal, 36 Penn. St. 373, which is that a debtor can not waive his exemption privilege in favor of a junior judgment-creditor, so as to give him a preference in the distribution of the proceeds of the debtor's real estate over prior judgment-creditors. If he waives it as to the latter, he waives it as to all the others, and they come in and take rank in the distribution according to the dates of their respective judgments. This last case denies the view taken by Lewis, J., in Johnston and Sutton's Appeal, 25 Penn. St. 177, and affirms that of Bowyer's Appeal, 21 Penn. St. 211, where Black, J., says (p. 214): "We are clearly of opinion that all stipulations not to claim the $300 made in favor of a particular creditor are void, so far as they are intended to affect others,"—the others, in the particular case, being prior creditors.

"The cases in some of the western states," to which the Massachusetts judge alludes, are as follows:

In McLaughlin v. Hart, 46 Cal. 639, a husband and wife owned a tract of land, a part of which had been claimed as a homestead in the manner prescribed by law. Both executed a mortgage of the whole tract to secure their joint debt, and the husband afterwards executed a mortgage upon the part not covered by the homestead, to secure his own debt. The first mortgagee foreclosed, making the second mortgagees parties. It was held that the second mortgagees could not insist that the homestead be first sold, but that the decree should direct that the part not covered by the homestead should be first sold; that if the proceeds should satisfy the first mortgage, the homestead should be reserved from sale; and that the second mortgagees must rely upon the surplus, if any, not covered by the first mortgage. The court said: "It is clear that as against the McLaughlin mortgage [the first mortgage], Mrs. Hart [wife of the mortgagor], had the right to insist that the outside lands, not included in that mortgage, should be exhausted before resorting to the homestead tract. In this view these outside lands constituted, to the extent of their value, a security against the possible sacrifice of her homestead to pay McLaughlin's debt. This security, for obvious reasons, could not be impaired to her injury without her consent. The debts are owing by her husband, and the liens of the junior mortgagees upon the outside lands were created by him alone and without her consent, and to hold that these latter mortgagees may, for their own benefit, compel a sale of the homestead to satisfy the McLaughlin mortgage, would be in effect to create a lien in favor of the junior mortgagees upon the homestead of Mrs. Hart without her consent."

The decisions quoted from Iowa were Twogood v. Stephens, 19 Iowa, 405, and Barker v. Rollins, 30 Iowa, 412. Contrary to the statement of the learned Massachusetts judge, this latter case *does* disclose how far it and the preceding one were influenced by local statutes. It discloses the existence of a statute in Iowa passed long anterior to both of those decisions which reads as follows: "The homestead may be sold on execution for

debts contracted prior to the purchase thereof, but it shall not in such case be sold except to supply the deficiency remaining after exhausting the other property of the debtor liable to execution." Code of 1873, § 1992; Revision of 1860, § 2281; Code of 1851, § 1249. The Iowa decisions, therefore, shed no light upon the question.

The Kansas decision—Chapman v. Lester, 14 Kan. 592—quoted by counsel in the Massachusetts case, accords in principle with the view of the Massachusetts court. It is there held that where a person mortgages his homestead, together with other realty, there is no such implied obligation on the mortgagee first to exhaust his remedy on the realty other than the homestead, as would prevent him from releasing such other realty and still retaining his lien on the homestead. It is there said that, in the absence of legislation (such as existed in the Iowa cases) and of express contract, the courts are not warranted in interpolating upon the contract of the parties such a stipulation.

The Wisconsin case quoted, White v. Polleys, 20 Wis. 503, is rather an authority for the position taken by the Massachusetts court than otherwise. In this case a homestead, together with other realty, was mortgaged to secure a debt. A sale being advertised under a judgment foreclosing the mortgage, the debtor applied for an order that his homestead, as defined by the statute, should be set apart to him, and requiring the referee to sell the other premises embraced in the mortgage before offering for sale the homestead. Bliss, a judgment-creditor, who had been made a defendant in the foreclosure suit, opposed the application, and showed that there was no property except the mortgaged premises out of which his judgment could be made. The court below granted the order, and Bliss appealed. The order was held erroneous, on the ground that it prejudiced the rights of the judgment-creditor. "The question is," said Cole, J., who delivered the opinion of the supreme court, "has the debtor a right to have that portion of the mortgaged premises subject to the lien of the judgment first exhausted to satisfy the mortgage, in order to preserve to him the homestead? Or is this right over-borne by the superior equity of the judgment-creditor to have the mortgage debt first charged upon the property not subject to his lien? It is a familiar rule that where a creditor has a claim upon two funds, on one of which another person has also a claim, and such other person will be prejudiced by allowing such creditor to satisfy his debt out of the fund subject to both claims, a court of equity will compel the creditor to take satisfaction out of the fund to which he alone has a claim in the first instance. He must exhaust that fund before resorting to the other. The same principle would seem to apply here, unless the right of the debtor to have the homestead secured to him is superior to and stronger than the equities of the judgment-creditor."

The doctrine of this case is supported by a previous case in the same state, Jones v. Dow, 18 Wis. 241. In this case the mortgage embraced the homestead and a business lot, and the homestead had been sold to satisfy the mortgage debt, leaving the business lot unsold. The debtor made application to have the sale set aside, so that the business lot might be sold first. But it appearing that there were creditors of the mortgagor, who had judgment-liens upon the business lot which were not liens upon the homestead, the supreme court affirmed an order refusing to set the sale aside. In delivering judgment, Chief Justice Dixon said: "Until the legislature shall have declared the obligation to preserve the homestead superior to that of paying one's honest debts, we must hold the equity of the creditor at least equal to that of the debtor in cases like this."

It is obvious that the Pennsylvania cases above quoted, are no authority for the conclusion of the Massachusetts court. In the Pennsylvania cases there were several judgment-creditors, and there was not enough for them all; but in the Massachusetts case, so far as appears from the report, there was but one lien creditor, and, according to the evidence tendered but rejected, there was more than enough to salisfy him—enough for this purpose without resorting to that part of it which constituted the homestead of the debtor and his family. It did not appear, so far as the report discloses, that to decree satisfaction out of the other portions of the estate would have wrought any hardship or even inconvenience upon the creditor. And thus the court appears to have decreed that the debtor and his family might be turned out of doors, not because it was necessary that it should be done, in order to satisfy the creditor, but because the creditor preferred that it should be done!

The Wisconsin cases appear to rest upon the same principle as those of Pennsylvania—that principle being that a debtor who waives his homestead privilege as to one creditor waives it as to all; and yet in marshalling liens in such cases there would seem to be nothing unreasonable, nor even inconvenient, in requiring creditors, in the order of their respective priorities, first to exhaust the non-homestead property of the debtor before proceeding to subject the homestead itself.

Nor are we prepared to assent to the view of the Massachusetts judge that the statutory right of homestead is entitled to no higher degree of favor than the courts have accorded to the common law right of dower. The analogy between the right of homestead and the right of dower is not as perfect as might at first appear. The statutory homestead is, in all the states, limited, either in physical extent or in value, or in both. The homestead, as thus limited, is merely sufficient to provide the family with an asylum against the rapacity of creditors, and a means of support, so that they shall not become a public charge. But a wife's dower may, and frequently does, amount to thousands of acres in extent and to tens of

thousands of dollars in value. The analogy between the two rights is, therefore, but partial, and conclusions deduced from such supposed analogy are liable to be erroneous.

PERSONAL INJURY—BARE LICENSEE.

WHITE v. FRANCE.

English High Court, Common Pleas Division, June 7, 1877.

The plaintiff, a licensed waterman, having complained to a person in charge, that a barge of the defendant's was being navigated unlawfully, was referred to defendant's foreman. While going along defendant's premises in order to see the foreman, the plaintiff was injured by the falling of a bale of goods so placed as to be dangerous, and yet to give no warning of danger. *Held*, (1) that the plaintiff was not a bare licensee, but was on defendant's premises by the invitation of defendant, and for a purpose in which both plaintiff and defendant had a common interest; and (2) that the injury was caused by a trap or concealed source of mischief within the meaning of Bolch v. Smith, 10 W. R. 387, 7 H. & N. 736.

This was an action to recover damages for personal injuries, tried before the deputy judge of the Surrey County Court held at Southwark, and a jury.

The facts of the case are sufficiently stated in the judgment of the court.

The jury found a verdict for plaintiff for £35 damages.

An order for a new trial was obtained on the ground that there was no invitation to the plaintiff, and that the plaintiff, at the time of the alleged negligence, was a bare licensee, and also on the ground of misdirection by the deputy judge in not telling the jury that there was no concealed danger at the defendant's wharf, and that the peril, if any, was apparent and known to the plaintiff.

Kemp, Q. C., now showed cause.

McCall, in support of the order, cited Indermauer v. Dames, 14 W. R. 586, L. R. 1 C. P. 274, 15 W. R. 434, L. R. 2 C. P. 311; Sullivan v. Waters, 14 Ir. C. L. Rep. 460; Scott v. London Dock Company, 13 W. R. 99, 410, 3 H. & C. 596; Toomey v. The London, Brighton and South Coast Railway Co., 6 W. R. 44, 3 C. B. N. S. 146; Wilkinson v. Fairrie, 1 H. & C. 633, 11 W. R. C. L. Dig. 100; Holmes v. North-Eastern Railway Co., 17 W. R. 800, L. R. 4 Ex. 254, L. R. 6 Ex. 123, 19 W. R. C. L. Dig. 49. Cur. adv. vult.

June 7.—DENMAN, J., delivered the judgment of the court (DENMAN and LOPES, JJ.):

In this case the facts were as follows: The plaintiff, a licensed waterman, was on the day before the day in question waiting for employment. According to a rule of the Thames Conservancy Board, barges of over fifty tons burthen ought to have two men employed to work them. The defendant's barge had been used with one man only, and the plaintiff went to complain to the person in charge. He was referred to one Reckles, the defendant's foreman, who would be there the next day. On the next day he was going to see Reckles, and walking towards him on the defendant's premises, when a bale of goods which had been, as the jury found, negligently left by the defendant's servants nicely balanced at the edge of the warehouse trap-door, from which such bales are lowered, suddenly fell upon the plaintiff and injured him. Under these circumstances, we think the verdict for the plaintiff was warranted by the authority of Corby v. Hill, 6 W. R. 575, 4 C. B. N. S. 556, and Indermaur v. Dames, and other cases. He was there on lawful business, in which both the plaintiff and defendant had an interest, and he was there by the invitation of the defendant's servants, who referred him to their foreman in a matter relating to the defendant's business. He was proceeding to the place mentioned by those who directed him, and the bale which caused the injury was placed in such a position as to be dangerous, and yet to give no warning of danger to any one passing by the spot where it fell, so that it was in the nature of a trap or concealed source of mischief within the meaning of those words, as used in Bolch v. Smith, 10 W. R. 387, 7 H. & N. 736, and in the case of Sullivan v. Waters, cited by the counsel for the defendant; so that, whether the plaintiff could be properly described as a bare licensee or not, the defendant would be liable. We, therefore, think that the order ought to be discharged.

Order discharged.

BANKRUPTCY—COMPOSITION.

IN RE BRADT.

United States District Court, District of Massachusetts.

Before Hon. JOHN LOWELL, District Judge.

1. BANKRUPTCY — COMPOSITION.—When a composition has been recorded, and part of the creditors have received their percentage, and a petition is brought under § 17, of ch. 390, of the act of 1874, to set the same aside, notice thereof should be given to the creditors as well as the debtor.

2. CREDITORS—ASSIGNMENT.—If in such a case, the composition has been set aside, creditors who have received their percentage may retain the same, but have no right to vote for assignee; and the assignment may be framed to protect all lawful acts done, or titles acquired under and by virtue of the composition.

3. VACATION OF ADJUDICATION.— When the creditors have been heard upon the merits of the question, it is not necessary to vacate the adjudication for a defect of notice, if a new decree of the same sort would follow.

In February, 1876, a petition in bankruptcy was filed against H. D. Bradt, as surviving partner of the firm of R. M. Dresser & Co., and he at once offered a composition, which was finally accepted and ordered to be recorded in April, 1876. It provided for payment of twenty per cent. by instalments secured by notes, the last payment to be at the end of six months from the date of recording the resolutions.

In February, 1877, one Hamlin filed a petition in the cause, alleging himself to be a creditor of Bradt, and that he and some others had not been paid the composition by reason of disputes concerning the amount of their respective debts, and that Bradt was apparently no longer able to pay the composition, but that the petitioner had reason to believe there were assets which might be reached by an assignee, and praying that the composition might be set aside, and for an adjudication of bankruptcy. After notice to the debtor, the petition was granted and a warrant was issued. At the first meeting of creditors, a question arose, and was certified to the court, of the right of a creditor who had received his twenty per cent. and released the debtor to prove his debt. Certain creditors then filed a notice to vacate the adjudication, or to modify it in such a way that the assignee should not disturb the payments which they had received under the composition.

The evidence tended to show that Bradt had given notes for the instalments of his composition to all the creditors whose debts were undisputed, or with whom he could adjust the amount due, leaving Hamlin and perhaps two others out of the account. There was no charge of fraud. Bradt's position was a difficult one,

because his partner had attended exclusively to the financial affairs of the firm, and had died suddenly, leaving the business in much confusion. After the composition was recorded, the petitioner Hamlin entered into a partnership with Bradt, and had lent him money, and they had disposed of the old stock of R. M. Dresser & Co., and of such new goods as they bought; but the business was not profitable, and the new firm dissolved. Bradt, in the meantime, paid all the composition notes as they came due, with the knowledge of Hamlin.

A. E. Pillsbury, for the petitioner; *B. F. Brooks*, *J. W. May*, *E. Avery*, and *Boardman & Blodgett*, for the creditors.

LOWELL, J., delivered the opinion of the court:

The statute of 1874, ch. 390, sec. 17, p. 184, provides, that if at any time, it shall appear to the court, on notice, satisfactory evidence and hearing, that a composition can not proceed without injustice or undue delay to the creditors or the debtor, the court may refuse to accept it or may set it aside, and that the debtor shall then be proceeded with as a bankrupt. Upon examination, I think the point is well taken that "notice" means notice to the creditors as well as the debtor. If the debtor should make the application, as he clearly may, there would be no doubt; but the court can not know that a creditor is not acting in concert with the debtor to obtain a reversal of the composition. The notice is undoubtedly intended to be given to the parties interested, and in almost all cases the creditors must be such parties. I was misled by the analogy of petitions for adjudication; and by the fact that the action in cases of this kind has been upon motions which showed on their face that all the creditors stood on an equal footing. But it is plain that a creditor hostile to the composition, if he could procure the acquiescence of the debtor, might do great mischief in this way. Without committing myself to the position that such notice is absolutely essential in all cases, I hold that it was in this case.

Several creditors having now been heard upon the merits of the question, it is not necessary to vacate the adjudication for a defect of notice, if a new decree of the same sort would follow. I therefore proceed to the other points taken by the creditors: That the remedy of setting aside the composition and going forward in bankruptcy is not appropriate to the case; that the petitioner, having stood by when the composition was entered into and when the notes were paid, is estopped; that, at any rate, the decree of adjudication should be so modified that it can not interfere with what has been done under the composition.

If the danger which the creditors fear, that the title of an assignee appointed at this time will relate back to February, 1876, so that the acts of the bankrupt since that day would all be voidable, were well founded, there would be very strong ground for holding this petitioner and all others having actual or constructive notice of the composition estopped to interfere with it. There was a time when it was thought that annulling proceedings in bankruptcy would render voidable everything done by an assignee; but this fear was quieted by the able judgment in Smallcomb v. Oliver, 13 M. & W. 77; and there was a somewhat similar case in this country. Penniman v. Freeman, 3 Gray, 245. It is the law now that to annul or supersede proceedings of this character means to stay their further prosecution.

So with compositions. The statute authorizes them; the court orders them, and payments made in conformity to a recorded resolution are not preferences. If the creditors are willing to trust a debtor to pay his composition, and exact no mortgage or transfer from him, they authorize him to raise the means for paying it by dealing with his property. *Ex parte* Russell, 1 Ch. D. 537; *Re* Reiman, 11 N. B. R. 41. And it can not be held that the creditors are bound to see each other paid.

There is a hardship, undoubtedly, for those creditors whom the debtor omits from his list or neglects to pay. In most cases all difficulties would be met by the appointment of an assignee or trustee to see that the composition is paid, and that all creditors are treated alike. I have not known the objection taken by a creditor in any case, that too much power was left with the debtor. I have not been willing to interpose *mero motu*, because, looking at the statute and its history, I am not satisfied that it was intended to insist that there shall always be such security, or any security, if creditors choose to dispense with it. Nevertheless, under our statute, which throws a decision upon the court, I think it might be a sound exercise of discretion in almost all cases to require security, if any creditor asked for it.

I am of opinion that the remedy of bankruptcy is intended to reach any case in which it is likely to work a beneficial result for one or more creditors, or for the debtor. The two or three creditors whose dividends have not been paid, have other remedies. They may apply to this court in a summary way to require the debtor to pay them; or they may bring actions at law; but I think they may likewise go on in bankruptcy, if there is no objection raised. In this case the debtor consents, and the general creditors have no objection, provided the decree shall be so modified as to express those points concerning the assignee's title which I have already said would be necessarily implied. To that they are entitled, because a decree should be clear and leave nothing to implication.

The ordinary form of assignment would make the assignee's title relate back to February 6, 1876, and that is the day to which his title will relate; but after that date must be added: "*Without prejudice to lawful acts done, or titles acquired, under and by virtue of the resolutions for composition heretofore recorded in this cause.*"

Let a certificate be sent to the register, that the creditors who have taken the composition have no right to vote for an assignee; and that the assignment should be in a qualified form, substantially as above indicated.

SLANDER.

PRIME v. EASTWOOD.

Supreme Court of Iowa, September Term, 1877.

HON. JAMES G. DAY, Chief Justice.
" JAMES H. ROTHROCK,
" JOSEPH M. BECK,
" AUSTIN ADAMS,
" WM. H. SEEVERS,
} Judges.

1. SLANDER — INTERPRETATION OF LANGUAGE.— When slanderous words imputing a crime are spoken, they are to be considered in an actionable sense, unless the evidence tends to show that, from the circumstances of the speaking, or from facts known to the hearer, they were not calculated to impress him with the fact that a crime was charged.

2. ——. QUO ANIMO—EVIDENCE.—Proof of the speaking of slanderous words at times not charged in the petition, is admissible for the purpose of showing malice.

3. ——. EVIDENCE—REMOTE INJURY.—It is not competent in an action of slander, to prove that the plaintiff has been troubled and suffered mental anxiety because of the speaking of the words.

4. ——. RUMOR—EVIDENCE.—In such an action it is not competent for plaintiff to prove that because of the

speaking of the slanderous words, there was a rumor in the neighborhood in reference to the charge.

APPEAL from Story Circuit Court.

This is an action for the recovery of damages for slanderous words alleged to have been spoken by defendant concerning plaintiff, charging plaintiff with stealing defendant's hogs. The first count of the answer contains a general denial to all the counts of the petition. The other counts of the answer admit that defendant had conversations similar to those alleged in the second and third counts of the petition, but allege that he spoke the words without malice, and without any intention of charging plaintiff with the commission of a crime. There was a jury trial, and a verdict and judgment for plaintiff for $400. The defendant appeals.

Rainbolt & Barnes, for the defendant; *McCarthy, Stevens & Underwood*, for the appellee.

DAY, Ch. J.:

I. Upon the trial, I. L. Porter testified as follows: About the 1st of November, 1875, defendant came to my house and said he was out looking for some hogs that he had lost, and claimed that his hogs were over at plaintiff's, who would not give them up; that he had asked plaintiff for them, and plaintiff said they were his own hogs, and he would not give them up. Defendant further said that he had cut off the ears and tails of them, to make them look like his hogs. I had another conversation four or five days afterward with defendant, in regard to the matter. He said: "Porter, I know you won't steal hogs, but I know George Prime will." Said I: "Mr. Eastwood, that is saying a good deal; you can't convince me, any way you can fix it, that George Prime would steal. He has his bad ways same as you and me, but so far as his stealing, I don't think he would do that. I have lived alongside of him as long as you have, and I say he won't steal." Defendant said: "I have lived near him as long as you have, and I know that he will." It is strongly urged by appellant that the words spoken to Porter are not actionable, and could not reasonably have been understood in an actionable sense. Appellant insists that "although the words themselves charged the plaintiff with the commission of a criminal offense, yet if they were understood in a different sense by Porter, and defendant intended that they should be so understood, defendant is not liable." Citing McCaleb v. Smith, 22 Ia. 243; Des Mond v. Brown, 33 Ia. 14; 1 Hilliard on Torts, 3d ed., p. 258; Townshend on Slander, 3d ed., p. 214, note 3; p. 173, note 1, and p. 189. The position of appellant would be correct, if there were any proof of circumstances known to Porter from which he understood that the words, in the connection in which they were employed, were not intended to impute a crime. Words are to be construed in the sense in which, in the light of all explanatory circumstances known to speaker and hearer, they are calculated to impress the hearer's mind, and will naturally be understood. Dixon v. Stewart, 33 Ia. 129, and authorities cited. The conversation in this case had reference to the plaintiff's having defendant's hogs in his possession, claiming them as his own, and having cut off their ears and tails to make them look like his own. Respecting this, defendant said: "Porter, I know you won't steal hogs, but I know George Prime will. I have lived near him as long as you have, and I know that he will." The natural import of these words is to charge the crime of larceny. There is nothing in the circumstances proved tending to show that Porter could reasonably have understood them in any different sense, or that he did in fact understand them in a different sense. Upon the contrary, the whole testimony of Porter shows that he understood the crime of larceny to be charged. The words, therefore, must be considered in their usual and ordinary acceptation.

II. The plaintiff introduces one Frank Gibson, who testifies as follows: "I met defendant one day and passed the time of day with him, and he spoke something about hogs. He said that plaintiff had stolen some of his hogs, and he could prove it." This testimony was objected to, for the reason that there is no allegation in the petition of a conversation with this witness.

Such evidence is admissible for the purpose of showing malice. Beardsley v. Bridgman, 17 Iowa, 291; Shumper v. Hilman, 24 Iowa, 505.

III. The plaintiff against objection was permitted to prove that, in consequence of the charge, he had been troubled and suffered mental anxiety. If this testimony was at all admissible, it must have been for the purpose of aggravating the damages. The action of slander is given for injuries affecting the reputation. In Turvilliger v. Wands, 17 N. Y. 54, it was held that special damages to support an action for defamatory words, not actionable in themselves, must result from injury to the plaintiff's reputation which affects the conduct of others towards him, and that his mental distress, physical illness, and inability to labor, occasioned by the aspersion, are not such natural and legal consequences of the words spoken as to give an action. In this case the court say: "It would be highly impolitic to hold all language wounding the feelings, and affecting unfavorably the health and ability to labor of another, a ground of action. The effect of such language depends often upon whether the sensibilities of the person spoken of are excited or otherwise, his strength of mind to disregard abusive, insulting remarks concerning him; and his physical strength and ability to bear them. Words which would make hardly an impression on most persons, and would be thought by them, and should be by all, undeserving of notice, might be exceedingly painful to some, occasioning sickness, and an interruption of the ability to attend to their ordinary avocations. There must be some limit to liability for words not actionable *per se*, both as to the words and the kind of damages; and a clear and a wise one has been fixed by the law. The words must be defamatory in their nature, and must, in fact, disparage the character; and this disparagement must be evidenced by some positive loss arising therefrom directly and legitimately, as a fair and natural result. In this view of the law words which do not degrade the character do not injure it, and can not occasion loss. The same doctrine is announced in Wilson v. Goit, 17 N. Y. 442. It seems to us that these cases announce the proper doctrine. If mental anxiety and distress of mind do not constitute such special damage as will sustain an action of slander for words not actionable *per se*, it is because distress of mind and mental anxiety do not constitute such damage as can be redressed by an action for slander, and consequently they can enhance the damages, where the words spoken are actionable *per se*. And this is the view declared in Townshend on Slander and Libel, section 391, in which it is said: "The plaintiff, to aggravate damages, can not prove the defendant's wealth, nor that it was currently reported that defendant had charged the plaintiff with the crime mentioned in the declaration, nor that the plaintiff had suffered distress of mind." The case of Swift v. Dickerman, 31 Conn. 285, holds a contrary view; so also does Dufort v. Abadie, 23 La. An. 280.

IV. Against the objection of defendant the court permitted the plaintiff to prove that there was a rumor in the neighborhood in reference to plaintiff, and that defendant had claimed that plaintiff had some of his hogs. The court instructed the jury as follows: "In

determining the amount of damages to be given to the plaintiff, if he is entitled to recover, you may consider the extent of the publication as how far known, and now understood and believed in the community where known, so as to determine the extent of the injury to his reputation." The words charged were spoken on different occasions to Porter, to Silden and to McCarthy, no one else being present. Every speaker is the publisher of what he speaks, and is solely liable therefor. That the words spoken have been previously published by another person neither relieves the subsequent speaker from his liability for the publication made by him, nor imposes any liability on the previous publisher. Townshend on Slander, sections 114, 202. In also Turwilliger v. Wands, 17 N. Y. 54, 58; Ward v. Weeks, 7 Bing. 211; Stevens v. Hartwell, 11 Metcf. 542. The true rule upon the subject, we think, is that recognized in Turwilliger v. Wands, *supra*, that where there is no proof of the circumstances under which slanderous words are repeated by the parties who originally heard them, the general rule that a repetition of slanderous words is wrongful applies, and damages which result from repeating them are a consequence of that wrong, and not a natural, immediate and legal effect of the original speaking by the defendant.

The effect of the action of the court in receiving this evidence and in giving the above instruction was to hold the defendant liable for the extent to which the plaintiff was injured by the publication by others, without reference to the circumstances under which the repetition was made. In this there was error.

REVERSED.

JURISDICTION OF U. S. CIRCUIT COURT—STOCKHOLDER'S BILL.

CHAFFIN v. CITY OF ST. LOUIS.

United States Circuit Court, Eastern District of Missouri, September Term, 1877.

Before John F. DILLON, Circuit Judge.

The United States Circuit Court will not entertain a bill in equity by a non resident stockholder of a resident corporation, where it appeares that the issues raised by the bill have been already adjudicated in a suit brought in the state court between the corporation and the proper adversary parties, and litigated there without fraud or collusion.

This is a bill in equity by complainant, a citizen of Massachusetts and the owner of one hundred and twenty-seven shares of capital stock in the St. Louis Gas Light Company, on his own behalf and that of other stockholders who may join them, against the St. Louis Gas Light Company, and the directors thereof, and the Laclede Gas Light Company, and the city of St. Louis, to procure the cancellation of certain contracts, to which said corporations are parties.

The amended bill of complaint states that, under the charter of the St. Louis Gas Light Company, the city was entitled to purchase the works, etc., of the said company, at a price to be determined by arbitrators, in 1860 and in 1865, if it elected at either of said times so to do; and that by a contract between the city and the company, of January 9th, 1846, the city relinquished its right to purchase in 1860; and said contract thereupon further provided that if the city should not exercise its right to purchase in 1865, it might purchase in 1870, in the same manner and to the same effect as is provided in this charter; and it is charged that said contract is and was invalid, illegal, void, and of no binding force, etc.

It is further alleged that in 1870, the city instituted an action in the Circuit Court of St. Louis County, to enforce said contract and acquire said works, etc., thereunder, and that the directors of the St. Louis Gas Light Company did not properly and in good faith defend said action, and that during its pendency in 1873, another contract was entered into between the city and the gas light companies, which was also illegal and void, and that said suit resulted adversely to the St. Louis Gas Light Company, and thereby, and by said illegal contracts, said complainant's shares of stock therein have suffered great depreciation in value, and, as against the city, it is prayed that said contracts of 1846 and 1873, be declared void, and be cancelled, and that the city be enjoined from claiming or exercising any rights thereunder.

The separate answer of the City of St. Louis then concludes with part and portion of same to which exceptions have been taken and are now urged. It is as follows:

"And further answering, said defendant says that on the 21st day May, 1870, the City of St. Louis instituted an action in the Circuit Court of St. Louis County (being the suit mentioned in the amended bill herein), against the St. Louis Gas Light Company for a specific performance of said contract, of January 9th, 1846, which said action was entitled: The City of St. Louis, plaintiff, against the St. Louis Gas Light Company, defendant; and said St. Louis Gas Light Company duly appeared in said action, and defended the same, and alleged in its answer to plaintiff's petition therein, that said contract of January 9, 1846, was invalid, for the same reasons now herein urged by complainant in his amended bill of complaint; that said suit was proceeded with in said county; and thereafter, upon August 4, 1875, the Laclede Gas Light Company was joined as a party defendant therein; and thereupon, it also appeared by counsel and defended; that said suit was thereafter duly tried and heard by said court upon evidence and witnesses adduced and heard on the part of plaintiff herein, the City of St. Louis; also on the part of said St. Louis Gas Light Company and said Laclede Gas Light Company; and such further proceeding were had therein, that, on June 1st, 1876, an interlocutory decree was rendered in said cause by said court, in which it was, amongst other things, adjudged and decreed by said court that said contract of January 9, 1846, was and is a valid and lawful contract, and binding upon the St. Louis Gas Light Company; and said Gas Light Company was forever enjoined and restrained from manufacturing or selling gas in the city of St. Louis, or its suburbs, or prosecuting the business of a gas light company; and a receiver was appointed of all the property and effects of said gas light company; and said receiver thereafter duly entered into the possession of the same; and now holds the same, and is manufacturing and selling gas in St. Louis, under the order and direction of said court; that further proceedings being had, a final decree in said cause was entered on the 12th day of February, 1877; that thereupon, the said St. Louis Gas Light Company filed a motion for a new trial and for a rehearing in said cause; which motion is now pending and undetermined in said court.

"And herewith is presented a certified copy of the original petition in said cause; the answer of the St. Louis Gas Light Company thereto—to amended and supplemental petition of plaintiff therein; the demurrer of the St. Louis Gas Light Company thereto; also the demurrer of the Laclede Gas Light Company, and the judgment of said court overruling said demurrers; the answer of the St. Louis Gas Light Company; and the replications of the city of St. Louis thereto; the interlocutionary decree of June 1st, 1876, therein; and the final decree of February 12th, 1877, therein,

which said certified copy is marked "Exhibit A," and their answer, and is herewith filed.

"And said defendant alleges that said cause—so instituted as aforesaid in the Circuit Court of St. Louis County—is still pending in said court; and that the same identical matters, questions and issues were presented for trial, adjudication and determination in said case, in said Circuit Court of St. Louis County, as are here presented for trial, adjudication and determination to this honorable court, by the amended bill of complainant herein; that said Circuit Court of St. Louis County had full, ample and complete jurisdiction to hear and determine said matter, questions and issues, and each and all of them, in said case; and that it did hear and determine the same, and all of them, and perpetually enjoined the St. Louis Gas Light Company from manufacturing and selling gas in St. Louis; that the said St. Louis Gas Light Company is now bound by said injunction, and subject to the further order of said Circuit Court of St. Louis County in said cause; that the St. Louis Gas Light Company and the directors thereof, in good faith, defended said action in the Circuit Court of St. Louis County, by counsel learned in the law, duly employed by them for that purpose, and they are now defending the same; that the proceedings, orders and judgments of said Circuit Court of St. Louis County, in said cause, are now in full force, and unreversed, and binding upon the St. Louis Gas Light Company, its directors and stockholders, including the complainant herein, if he be a stockholder, as alleged in his amended bill of complaint."

A certified copy of the record, including the proceedings, pleadings and decrees in said cause in the state court, is filed with the answer as an exhibit.

The complainant excepts to the above parts of said answer, on the ground that they fail to state facts sufficient to constitute a legal defense to his amended bill of complaint; and the questions presented by said exceptions are now here to be determined.

F. J. Bowman, for the plaintiff; *L. Bell* and *E. T. Farish*, for the city of St. Louis.

DILLON, Circuit Judge:

The answer sets up the suit of the City of St. Louis, commenced in May, 1870, in the state court, against the St. Louis Gas-Light Company (in which the present plaintiff is a stockholder) to enforce the right of the city to purchase the works and property of the gas company, conferred by the legislature of the state in that behalf, and the contract of January 9, 1846. This alleged right of the city to make such purchase was denied by the gas company, and the record of that suit shows that such right was vigorously resisted at every step of the progress of that suit. After a hearing on the merits, that court, June 1, 1876, entered an interlocutory decree declaring that the contract of January 9, 1846, was valid, and that the city had the right to purchase the works and property of the gas light company; and afterwards, on the 12th day of February, a final decree was rendered effectuating such right and declaring that all the estate, interest and claim of the gas-light company to its works and property be vested in the City of St. Louis; which decree is alleged in the answer to be in full force and unreversed. The present suit by a stockholder in the said gas-light company was brought in this court November 23, 1876, which was after the interlocutory decree above-mentioned was rendered in the state court.

One of the main objects of the present bill is to have the contract of January 9, 1846, declared null and void as respects the gas-light company. But the state court having jurisdiction of the suit of the City against the Gas-Light Company, upon pleadings presenting that precise issue, has judicially determined that said contract, in the respect here involved, was a valid contract, and the answer which pleads this decree, avers that the gas-light company and the directors in good faith defended said action in the state court, and are now defending the same, and further avers that this decree in the said suit, which is in full force, is binding upon the gas-light company, its directors and stockholders, including the complainant. A decree thus rendered upon adverse proceedings and without fraud and collusion is binding upon the gas-light company and upon its stockholders; and the latter can not, as we said when the injunction asked for was denied, afterwards draw the litigation into a federal court in a suit between themselves and the litigants in the state court. If this could be done there would be no end to a suit against a private corporation so long as any stockholder should see fit to re-litigate the same controversy in his own name.

The exceptions to the answer are disallowed.

ORDERED ACCORDINGLY.

LOSS OF BAGGAGE CARRIED FREE.

FLINT AND PERE MARQUETTE RAILWAY CO. v. WEIR.

Supreme Court of Michigan, June Term, 1877.

HON. T. M. COOLEY, Chief Justice.
" J. V. CAMPBELL, }
" ISAAC MARSTON, } Associate Justices.
" B. F. GRAVES, }

1. ACTION.—Damages for the loss of baggage can not be recovered *in assumpsit* against the carrier, if the baggage was carried free. An action of tort, however, will lie for negligent loss.

2. FREE BAGGAGE.—A railway company carrying baggage free is held to no greater diligence than any other gratuitous bailee.

3. FREE CARRIAGE OF PERSONS.—Public policy requires that common carriers should exercise the same extreme care in carrying persons free as in carrying them for hire.

COOLEY, C. J., delivered the opinion of the court:

The manner in which this case is submitted makes the record present substantially this question: Whether, in the court below, there was any evidence tending to prove the plaintiff's case? The action was begun in a justice's court, and the declaration is as follows:

"Saginaw County, ss. John B. Weir, plaintiff herein, complains of The Flint & Pere Marquette Railway Company, defendant herein, in a plea of trespass on the case upon promises; for that whereas the said defendant, before and at the time of the delivery of the goods and chattels to said defendant, as hereinafter mentioned, was, and from thence hitherto hath been and now is, a common carrier of passengers and baggage, and goods and chattels, for hire, to and from Detroit, in the State of Michigan, to East Saginaw, Jackson Landing, and Saginaw Railroad Crossing, and Saginaw City, in the State of Michigan; and as such common carrier, the said plaintiff, on the 9th day of November, A. D. 1875, took passage on the railway and cars of said defendant, from Grand Trunk Junction, in the County of Wayne, to Saginaw, in the County of Saginaw; and did then there deliver to said defendant, and the said defendant then and there accepted and received of and from the said plaintiff, certain goods and chattels of the said plaintiff, to wit: One trunk, one silk-finished dressing-gown, etc., [naming several other articles] of great value, to wit, of the value of three hundred dollars, to be safely and securely carried and conveyed by the said defendant from Grand Trunk Junc-

tion, aforesaid, to Saginaw, aforesaid, and then, to wit, safely and securely to be delivered to said plaintiff, for certain reasonable hire and reward paid to said defendant in that behalf, and the said defendant, then and there, in consideration of said hire and reward, undertook and faithfully promised the plaintiff to safely and securely carry and convey the said plaintiff and said goods and chattels from Grand Trund Junction, aforesaid, to Saginaw, aforesaid, and to take good and proper care of said goods and chattels, and in and about the carriage and conveyance of the same and the delivery thereof as aforesaid; yet the said defendant, not regarding its said promise and undertaking in that behalf, did not safely and securely convey and deliver the said goods and chattels to the said plaintiff, but so carelessly and negligently conducted itself with respect to said to goods and chattels that by and through the negligence, carelessness and improper conduct of said defendant and its servants in that behalf, the said goods and chattels being of great value, to wit, of the value of three hundred dollars, became and were wholly lost to the said plaintiff, to wit, at Saginaw, aforesaid; by means whereof the said plaintiff hath sustained damages in the sum of three hundred dollars; which said sum of money the said defendant there, to wit, at Saginaw, aforesaid, undertook and promised to pay the said plaintiff," etc.

The evidence was put into the case by stipulation, and in the main the facts are undisputed. It appears that the plaintiff took passage upon the cars of the defendant from Detroit to Saginaw, and that he had with him a trunk which he avers contained the articles of personal property described in the declaration. This trunk had been lost, but whether through any fault of the railway company is in dispute. It is, however, shown by the sheriff himself, that both he and his trunk were being carried, not for hire and reward, but gratuitously. There was consequently no contract for carriage by the railway company, and this action, which is in assumpsit, can not be maintained. Nolton v. Western R. Company, 15 N. Y. 444, 446.

There can be no question that a railway company which receives property for a gratuitous carriage, assumes, like any other gratuitous bailee, cetain duties in respect to it, and that a suit will lie for a failure to perform these duties. But the obligation in such cases is quite different from the obligation of a bailee, who for a consideration received or promised, undertakes to carry or to perform any other service, with respect to the subject of the bailment. In the latter case, the terms of the contract, if an express contract was made, will be the measure of the duties performed, and, in the absence of any express contract, the law itself will impose upon the bailee a higher degree of care and watchfulness, than it demands from him, who, for the mere accommodation of the bailor, undertakes the charge of his goods. The gratuitous bailee must not be reckless; he must observe such care as may reasonably be required of him under the circumstances; but it is not the same care which is required of the bailee, who for his own profit assumes the duty. This is elementary, and is so reasonable that it requires no discussion. When care is bargained for and compensated, something is expected and is demandable beyond what can be required of him who undertakes a merely gratuitous favor.

Reliance is placed by the plaintiff upon certain cases which are supposed to have decided that the obligation of a railway company to carry safely, is unaffected by the fact that no fare was paid. None of them so decides. Todd v. Old Colony, etc., R. R. Co., 3 Allen, 18, was an action for an injury to a person who was riding without payment of fare. The court recognized the obligation of the carrier to observe due and reasonable care, but expressly said that it did not appear that the facts proved at the trial rendered it material to consider whether a less degree of care was demandable than in cases where fare is paid. In Nolton v. Western R. Corporation, 15 N. Y., 444, 450, which was an action for injury to a mail agent, carried on the cars under contract with the government, it is said that "the matter of compensation may have a bearing upon the degree of negligence for which the company is liable," but no decision on that point became necessary. In Perkins v. N. Y. Central R. R. Co., 24 N. Y., 196, the question was how far it was competent for a carrier of persons to contract for an exemption from liability for injuries caused by negligence. Incidentally it was remarked (p. 200), that a carrier undertaking to cary one gratuitously, "must do it carefully, as with other passengers." By this, we understand that, as in other cases, they must carry with care; not necessarily that they must carry with the same degree of care as in other cases. The court does not even by dictum go so far as that. In Ohio & Miss. R. R. Co. v. Selby, 47 Ind. 471, the action was for a personal injury, and it was found by the court that the plaintiff was being carried for hire. In Jacobus v. Paul R. R. Co., 20 Minn. 125, Cent. L J., which also involved the question of the right to contract for exemption for liability from injuries arising from negligence, there is a doctrine that "the same extreme care is required" where a passenger is carried gratuitously as in other cases. For this the cases already referred to are cited as authority, and also the two which follow: Philhdelphia & Reading R. R. Co. v. Darby, 14 How., 468. In this case the jury found the injury to have been the result of gross negligence, and the court (p. 485-6), expressly decline to express any opinion, whether the care demandable by one who is being carried gratuitously is the same that is due to those carried for hire. Steamboat New World v. King, 16 How., 469. The same remark may be said of this case as of the last.

But we do not care to comment upon these cases, or to say more of them than this: that the right of recovery in each of them where the carriage was gratuitous, was based upon the duty of one who undertakes to carry persons—to carry them safely; a duty independent of any contract, and which the carrier owes not exclusively to the person being carried, but also to the state itself. In such a case, especially if the mode of carriage is peculiarly subject to dangerous and destructive accidents, the carrier may well be required to observe a high degree of care and diligence. But where only property is in question, there is no reason why any different rule should be applied to a railroad company taking charge of property gratuitously, from that which governs the relation in the case of any other gratuitous bailment. Nor is it material that the gratuitous carriage of a trunk was accompanied by the gratuitous carriage of a person; the duty to carry the trunk safely was only the same that the law would have imposed had the trunk been taken upon a freight train gratuitously; and no greater degree of care could be demanded in one case than in the other. It may therefore be conceded that the same extreme care is demandable of carriers of persons, in all cases where injuries to persons are in question, and the concession will not in any manner affect the present suit.

But as the plaintiff has brought his action, not in tort, but upon contract, there can be no recovery under his declaration; and the extent of the duty which, under the circumstances, was imposed upon the railway company, becomes immaterial. The judgment must be reversed, with costs; but as the facts are not embodied in a finding by the circuit judge, so as to permit of our entering final judgment in this court, a new trial must be ordered.

DEED OF LUNATIC — JURISDICTION OF PROBATE COURT.

THOMAS FARLEY, RESPONDENT v. P. C. PARKER, APPELLANT.

Supreme Court of Oregon, December Term, 1876.

Hon. P. P. PRIM, Chief Justice.
" J. F. WATSON, }
" R. P. BOISE, } Associate Justices.
" E. D. SHATTUCK, }
" L. L. MCARTHUR, }

1. DEED OF PERSON NON COMPOS MENTIS VOID, and when submitted to show title in an action of ejectment, may be impeached by evidence showing the existence of that condition, at the time of the execution of the deed.

2. MAY BE IMPEACHED BEFORE OFFICE FOUND.—Such deed may be impeached, though executed before office found and while the grantor therein is not under guardianship.

3. INTIMATE ACQUAINTANCE MAY GIVE OPINION, WHEN. —Under § 696, Sub. Div. 10, Oregon Code, if the testimony shows that the witness is an intimate acquaintance of the insane person, it is sufficient, even though he should not in express words declare the fact.

4. PROBATE COURTS UNDER TERRITORIAL GOVERNMENT. —The probate courts, under the territorial organization were courts of limited and inferior jurisdiction.

Willis & Eglin and *A. C. Gibbs*, for appellant; *F. A. Chenoweth* and *E. C. Bronaugh*, for respondent.

PRIM, C. J., delivered the opinion of the court:

This is an action to recover the possession of real property. The respondent claims to own the undivided one-sixth part of eighty acres of land, as one of the heirs at law of Michael Farley, deceased. The answer denies the allegation of the complaint, and alleges that one Colvin is the owner of said land, and that appellant is in the possession thereof under a contract of purchase from said Colvin. The replication puts in issue the affirmative allegations in the answer.

Respondent obtained a verdict and judgment in the court below, from which appellant appeals to this court. Both parties claim under Michael Farley, to whom patent issued by the U. S. Government for a donation claim of 320 acres, of which the eighty acres in controversy is a part. Appellant claims that Michael Farley in his life-time sold and conveyed the land in question to said Colvin, and the respondent claims that at the time of the execution of said deed Michael Farley was insane, and so the deed was and is void, and that the title remained in Michael Farley up to the time of his death. After the plaintiff rested his case, the defendant's counsel offered in evidence a deed from Michael Farley to Thomas Colvin, under whom, by conveyances, defendant claims title, and rested. The plaintiff's counsel then undertook to show by evidence that the deed to Colvin was void, on the ground that the said Michael Farley was insane at the time the same was executed. To show the insanity of said Farley, the plaintiff by his counsel offered to read in evidence the deposition of A. J. Swearingen, to which defendant by his counsel objected, and, the objection having been overruled, the defendant excepted.

The defendant's counsel based his objection to the admission of this deposition on the following grounds: 1. The insanity of a person not under guardianship can not be shown in an action of ejectment. 2. A deed given by an insane person not under guardianship is voidable, but not void. 3. The plaintiff's remedy, if he has any, is by suit in equity, and not by action at law.

Neither of these grounds, we think, were sufficient upon which to reject this deposition. There appears to be some confusion in the cases reported, as to whether a contract or deed by an insane person should be treated as void, or only voidable. Mr. Parsons says: "The words void and voidable have often been very vaguely used when applied to contracts, and the word void has been frequently used to denote merely that the contract was not *binding*, and as expressing no opinion whether such contracts might or might not be ratified." 1 Parsons on Contr. 327, note *b*. This being an action to recover real property, and defendant claiming title under a deed executed by said Michael Farley to Colvin, it was necessary to produce said deed in evidence to sustain his title. And when thus produced, although appearing to be regular on its face, we think plaintiff had a right to attack and impeach it by any evidence tending to show that it was not the deed of said Michael Farley, or, as is claimed in this case, was executed by him while insane and not capable of executing a deed or any other instrument requiring volition.

In Dexter v. Hall, 15 Wall. 20, it was held that a power of attorney executed by a lunatic or a person *non compos mentis* was absolutely void. That was an action of ejectment, and the question presented here was ably argued and thoroughly considered by the court in that case. Mr. Justice Strong, in delivering the opinion of the court, says: "Looking at the subject in the light of reason, it is difficult to perceive how one incapable of understanding, and acting in the ordinary affairs of life, can make an instrument the efficacy of which consists in the fact that it expresses his intention, or, more properly speaking, his mental conclusions. The fundamental idea of a contract is that it requires the assent of two minds. But a lunatic, or person *non compos mentis*, has nothing which the law recognizes as a mind, and therefore can not make a contract.

In Van Dusen v. Sweet, 51 N. Y. 383, which was also an action of ejectment, it was held competent to show that Sweet was of unsound mind at the time of executing a certain deed, although no fraud had been practiced upon him to induce its execution, and although his competency to transact business had not been legally or judicially ascertained prior to or at the time of its execution. And it was further held that a deed executed by a person *non compos mentis* was not only voidable, but absolutely void.

As we understand these decisions, they mean simply that a deed, regular on its face, will be declared void whenever the testimony submitted shows that the person executing it was at the time of its execution *non compos mentis*.

The deposition of Swearingen was further objected to, on the ground that it did not appear that the witness was intimately acquainted with Michael Farley. This witness, not being a professional witness, could not give his opinion as to the mental sanity of a party unless shown to be an intimate acquaintance. Civil Code, sec. 696, subdiv. 10. It does not appear in the deposition of this witness that he stated directly in words that he was an intimate acquaintance of said Farley, nor do we think it was necessary that he should have done so, in order to bring him within the rule laid down by the statute. When such evidence is offered, the court may look into the facts stated by the witness, in order to determine whether he was an intimate acquaintance of the party, and whether the facts stated are sufficient upon which to base an opinion as to the sanity of the party. Applying this rule to this deposition, we think it sufficiently appears that the witness was an intimate acquaintance of said Farley, and that the facts stated by him were sufficient upon which to base an opinion as to his mental sanity. And by applying the same rule to the deposition of Reed, we think the opinion of that witness was properly re-

jected by the court, as being nothing more than a casual acquaintance.

It follows, from the views herein expressed, that there was no error committed by the court in its rulings upon either of these depositions.

For the purpose of showing the condition of Michael Farley's mind on November 28, 1856, just after the execution of the deed to Colvin, the plaintiff was allowed to read in evidence certain papers, called "Proceedings in the Probate Court in Vacation, Oct. 20, 1856." Defendant by his counsel objected to the admission of these papers, on the following grounds: 1. That it did not appear that said probate judge had jurisdiction of the person of said Michael Farley. 2. That no proper notice or citation had been issued in said proceeding. 3. That no notice of said proceeding had been served upon him, and there was no appearance by or for him, and the said proceedings were void. These objections were overruled by the court, to which ruling the defendant by his counsel duly excepted, upon which he assigns error and relies to reverse the judgment. It was insisted by counsel on behalf of the plaintiff that the court of probate in Oregon is a court of superior and general jurisdiction, and unless it appears affirmatively from the record of its proceedings that it did not have jurisdiction of the person or subject-matter affected by its decision, the presumption of law is in favor of its judgment. Russell v. Lewis, Tustin v. Gaunt, and several other decisions made by this court, are cited and relied upon to sustain this proposition. But these decisions, we think, are not applicable, for the reason that the judgment or proceeding in question was not made by a court of general and superior jurisdiction, but appears to have been a proceeding had in 1856, under the territorial organization prior to the formation and adoption of the state constitution. The probate court at that time was composed of a single judge, and had no clerk, and we think was a court of limited and inferior jurisdiction, and therefore not entitled to any presumptions in favor of its jurisdiction. The facts necessary to give it jurisdiction must appear among its proceedings, or they must be treated as void. In Tustin v. Gaunt, 4 Or. 305, it was decided by this court, that the constitution of this state having provided that county courts should be courts of record having general jurisdiction to be defined and limited by law, and the legislature having given them exclusive and original jurisdiction in all matters pertaining to probate courts, such courts, in exercising judicial powers in such business, should be regarded as courts of general and superior jurisdiction. That decision was based expressly on the constitutional provision, and had no reference or application to the judgments and proceedings of probate courts rendered prior to the adoption of the constitution. The proceedings had in the probate court on October 20, 1856, in relation to the insanity of Michael Farley, failing to disclose the facts necessary to give the court jurisdiction, were a nullity, and should have been rejected by the court. And the court below having committed error in admitting this evidence, the judgment is reversed and the cause is remanded for a new trial.

MUNICIPAL CORPORATIONS.

DAVIS v. THE STATE.

Court of Appeals of Texas, Austin Term, 1877.

Hon. M. D. Ecter, Presiding Judge.
" C. M. Winkler, } Justices.
" John P. White, }

1. Municipal Corporations — Statutes, Construction of—Constitutional Law.—A legislature, in the grant of a municipal charter, may, by express provision, except the inhabitants of such municipality, from the operation of previous general laws applicable to the remaining territory of the state, in the absence of constitutional restriction.

2. The Same.—The penal code of Texas (adopted in 1856), inhibited the keeping of a house for public prostitution within the state, under a penalty of not less than $100, nor more than $500. On April 26, 1871, a charter was granted the city of Waco, and among other powers therein delegated, was the power "to suppress bawdy houses or license the same." Appellant took out a license under an ordinance passed in pursuance of said power. *Held*, that such license was a bar to prosecution by state authority for any violation of the general law, during the time said license was in force.

3. Statute, Repeal of as Affecting License.—The mere repeal of a tax statute or ordinance, after issuance of a license thereunder, and before the expiration of such license, does not, in general, affect the license; especially, if there be some general statutory or local regulation as to revocation which is not pursued.

Appeal from the County Court of McLennan County.

Clark & Dyer, for appellant; *Geo. McCormick*, Assistant Attorney-General, for appellee.

Ecter, P. J.:

This was an indictment under article 2027 of the Criminal Code of the State of Texas (Paschal's Digest), for keeping a disorderly house, to wit: a house for public prostitution. The defense relied on was a license from the corporate authorities of the city of Waco. The indictment charges that the defendant, Mrs. M. W. Davis, did keep such disorderly house in the County of McLennan, on the 27th day of March, 1877. She was tried and convicted, and her punishment assessed at a fine of one hundred and twenty dollars. She filed a motion for a new trial, which was overruled by the court, and the case is now before us on appeal.

The State proved that the defendant, on the 27th of March, 1876, and up to the filing of the indictment, did keep a disorderly house for the purpose of public prostitution, on North Fourth street, in the city of Waco, and County of McLennan. The defendant then introduced and read in evidence the charter of the city of Waco, approved April 26, 1871, and read section 7, from clause 1 to clause 18 inclusive:—"Section 7. The mayor and city council shall have power within the city by ordinance, first, to levy and collect taxes," etc. It then proceeds to a specific enumeration of the several powers granted, embracing a great variety of subjects. The eighteenth of these clauses is, "To license, tax and regulate billiard tables, tippling houses and dramshops, and to suppress gaming and gambling houses, and other disorderly houses, or to suppress bawdy houses or license the same."

The defendant next introduced and read in evidence an ordinance of the city of Waco, passed July 12, 1871, and published under authority of said city, embracing articles 43, 44, 45 and 46 of the General Ordinances. Article 43 is as follows: "Article 43. Every keeper of a bawdy house within this city shall pay an annual license tax to the city of two hundred dollars for the privilege of keeping the same," etc. "Article 44. A bawdy house is house kept for the purposes of prostitution, and is visited by the public for such purposes."

The defendant read in evidence two licenses, granted by the recorder of Waco to the defendant. The first, dated 27th of March, 1876, authorizing and empowering her to keep a bawdy house in the city of Waco for one year from that date; and the second, dated 27th of December, 1875, to keep a bawdy house in the city of Waco for three months.

The defendant next read in evidence article 233 of the General Ordinances of Waco, as follows: "Article

233. No license shall be sold or otherwise transferred, and the city council may at any time revoke any license issued under any ordinance on re-payment of any amount which may have been paid by the holder of said license, after deducting the amount due on the time expired."

The prosecution read in evidence an ordinance of the city of Waco, approved April 6, 1876, repealing all ordinances granting licenses to any one to keep a bawdy house.

The defendant read an ordinances of the city of Waco, passed October 5, 1876, to regulate and license bawdy houses in the city.

The lower court in the latter part of the third instruction to the jury, in regard to the licenses issued by the corporate authorities of the city of Waco to keep a bawdy house, charged the jury as follows: "That the license as a defense against the charge preferred against this defendant is of no avail, the grant to the city to license being void from the beginning. 4. If the jury believe that defendant kept a disorderly house as charged, it would be their duty to return a verdict of guilty and fix the punishment at not less than $100 nor more than $500."

The defendant's counsel excepted to the charge of the court, and also asked the following charge, which the court refused to give: "The defendant asks the court to charge the jury, that if the jury believe from the evidence that the charter of the city of Waco authorized the corporate authorities of said city to license bawdy houses, and that, in persuance of that power, an ordinace was passed by said corporate authorities, authorizing the licensing of such houses, and that under the provisions of such ordinance, the defendant applied for and took out such license or licenses for the term of one year, from March 27, 1876, or previous thereto, and that the act of keeping such bawdy house, as charged in the indictment, occurred after taking out such license and before their expiration, then they are instructed that such licenses present in law a complete defense to this prosecution, no matter whether the ordinance aforesaid was repealed immediately after their issuance or not."

The first main question for us to decide in this cause is, does the special act of April 26, 1871 (Sp. Laws, 1st Sess., 12th Legislature, ch. 113, sec. 7, clause 18), control the general law of August 26, 1856 (Art. 2027, Crim. Code, Pasch. Dig.), upon the subject of bawdy houses, within the corporate limits of Waco?

The charter of the special act of April 26, 1871, is the junior of the criminal code by fourteen years, and in cases of conflict, the junior law (as a general rule of construction), must prevail. Dwarris on Stat. p. 156; Sedgwick on Stat. and Const. Law, 100; Harrington v. Trustees, 10 Wend. 550; Bowen v. Lease, 5 Hill, 225; Williams v. Potter, 2 Barb. 316; Van Rensellaer v. Snyder, 9 Barb. 302; Johnson v. Byrd, 1 Hemp. 434; Maddox v. Graham, 2 Metc. (Ky.) 56. It does not change the rule, although the former is a general, and the latter statute is a special charter. Tierney v. Dodge, 9 Minn. 166; Wood v. Wellington, 30 N. Y. 218; State v. Jones, 18 Tex. 879; Burke v. Jeffries, 20 Iowa, 145.

Judge Cooley says: "Municipal by-laws must be in harmony with the general laws of the state, and with the provisions of the municipal charter. Whenever they come in conflict with either, the by-law must give way. The charter, however, may expressly or by necessary implication, exclude the general laws of the state on any subject, and allow the corporation to pass local laws at discretion, which may differ from the rule in force elsewhere. Cooley Const. Lim. 3d Ed. 198; Goddard, Petitioner, 16 Pick. 504; Commonwealth v. Patch. 97 Mass. 222; St. Louis v. Weber, 44 Mo. 547.

Judge Dillon, in his work on Municipal Corporations, announces the same principle, and goes further. He says: "Statutes of a general nature do not repeal by implication charters and general acts, passed for the benefit of particular municipalities. 1 Dillon on Mun. Corp. § 54, 2d ed. See, also, the authorities referred to in his note under the section quoted.

It is no legal objection to the charter of the city of Waco, that it authorized the city authorities of Waco to license bawdy houses in Waco, when there was an express provision of the code, making it a misdemeanor to keep such houses in all other parts of the state. There was no constitutional provision when the special act was passed, which prevented the passage of such an act.

Mr. Cooley says: "Laws, public in their object, may, unless constitutional provisions forbid, be either general or local in their application; they may embrace many subjects or one; and they may extend to all citizens or be confined to particular classes, as minors or married women, bankers, traders and the like. The authority which legislates for the state at large, must determine whether particular rules shall extend to the whole state and all its citizens, or, on the other hand, to a subdivision of a state, or a single class of citizens only." Cooley Const. Lim. 390. This doctrine is fully recognized in the case of Orr v. Rhine, decided by the Supreme Court of Texas, Tyler Term, 1875, this last decision not published. To make a statute a public law of general obligation, it is not necessary that it should be equally applicable to all parts of the state; all that is required is that it shall apply equally to all persons within the territorial limits described in the acts. State v. County Commissioners of Baltimore, 29 Md. 516. The cases relating to municipal corporations stand upon peculiar grounds, from the fact that those corporations are agencies of the government, and, as such, are subject to complete legislative control.

The case of the State v. Clark, 54 Mo. 17, 1 Cent. L. J., 14 Am. Repts. 471, is a case in point. The facts of that case are very similar to the facts in the case at bar, with the difference, if any, that the charter of St. Louis authorized the city authorities to *regulate* bawdy houses, while the charter of Waco authorized the city authorities to *license* them. The Supreme Court of Missouri held that under the power given to the City Council of St. Louis under the municipal charter, to "regulate bawdy houses," a city ordinance licensing them is valid under the charter, notwithstanding the general inhibition of the statute; and a license taken out in conformity with the ordinance, by anyone, will shield him or her from criminal proceedings by the state; and that such ordinance is not void, as against public policy or good morals. The following is copied from that opinion: "It is said that this ordinance is subversive of the common law, contrary to the general law of the state, against public policy, and of an immoral tendency. The legislature has a right to change the common law, it has a right to allow the legislative authorities of St. Louis to regulate the subject now under consideration differently from what it is in other portions of the state. It is a naked assumption to say that any matter allowed by the legislature is against public policy. The best indication of public policy is to be found in the enactments of our legislature. To say that such a law is of immoral tendency is disrespectful to the legislature, who, no doubt, designed to promote morality. * * * With the expediency, or propriety, or wisdom of a legislative enactment, we have nothing to do. If a constitutional right is infringed, the courts are open to afford redress."

Arguments on the subject of the morality of the law should be addressed the legislature or the City Council of Waco. The people originally possessed all legisla-

tive power. They have entrusted this power generally to the several state legislatures, saving only such restrictions as are imposed by the Constitution of the United States, or of the particular state in question. Denio, C. J., says, "The people, in framing the constitution, committed to the legislature the whole lawmaking power of the state, which they did not expressly or impliedly withhold. People v. Draper, 16 N. Y. 543."

There is only one other question which we will consider, briefly, in this case, and that is, as to the effect of a repeal of the ordinance of April 6, 1876, after the defendant had taken out such a license for one year. We are inclined to think that a mere repeal of an ordinance or statute after issuance of a license, does not affect its validity. As article 233 of the General Ordinances of Waco was in force, as appears from the testimony, when the licenses read in evidence by the defendant, were issued, the defendant had notice that the city could at any time revoke any license issued under any ordinance on repayment of any amount which may have been paid by the holder of said license, after deducting the amount due on the time expired. The city of Waco could have tendered the defendant back the money paid for her license, less the amount due on the time expired, and formally have revoked her license; and had this been done by the corporate authorities of the city of Waco, the defendant would have been liable to punishment under the general law, for longer following the occupation of keeping a house of public prostitution in the County of McLennan.

Because the lower court erred in its charge to the jury the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

CORRESPONDENCE.

PROPOSED LEGISLATION TO REMEDY THE EVILS RESULTING FROM DEFECTIVE TAX TITLES.

To the Editor of the Central Law Journal:

So far as I have observed, no system has yet been devised for selling real estate for taxes, which secures the owner of the property against oppression, and at the same time gives to the purchaser that assurance of protection which a reasonably prudent man ought to require when he makes a purchase.

It seems hard that the owner should lose his entire estate from his inability or neglect to pay the tax, or from his ignorance or negligence in redeeming it within the time allowed by law. It is doubtless for this reason that courts uniformly lean against tax titles, and it has become the settled law that every requirement of the statute under which the sale is had must be strictly complied with, or the sale is void.

When we recollect that several of the prerequisites to a valid sale ordinarily rest in parol,—for instance, that the tax-payer has no personal property,—and that the purchaser must risk his money on what a jury will find as to these matters, about which he can not know what evidence will be produced, it is not strange that so few persons can be found who will buy at a tax sale; and experience has demonstrated that, in the great majority of cases, tax titles will not stand the test of legal scrutiny. The law provides a heavy penalty in the event of redemption, and holds out to the purchaser that he will get the property at the price he bids, or a large return for his money invested. But the result is that he gets neither, in many cases. If the defaulting tax-payer is a woman, unacquainted with the ways of the world, and frightened at the idea of getting into a law suit, or is a good citizen, unwilling to be classed as a defaulter in the public duty of paying taxes, the purchaser may get his money refunded, with the heavy penalties added; but if the tax-payer belongs to that large class who refuse to pay anything which can not be forced out of them by law, the purchaser generally gets nothing for his money except the privilege of bringing a suit, in which he will add costs and lawyers' fees to the amount already lost in making the purchase.

Thus the extraordinary heavy penalties against defaulting tax payers fall almost wholly on those who are the least able or the least deserving to bear them, while those at whom they are aimed frequently escape without the payment of any tax at all; and the purchasers at tax sales are those only who are deceived by the glittering offers which the law holds out, or those who are willing to risk a small outlay for the chance of a large return.

In this state large quantities of land are sold every year for taxes, and bought in by the state, because no other purchaser can be found. The state has no adequate machinery for handling such property, even when a title is acquired, and the practical result is, that the revenue which ought to be derived from the real estate sold for taxes is almost wholly lost.

It is obvious, from Judge Cooley's work on Taxation, Blackwell on Tax Titles, and the reports of the several states, that evils resulting from defective tax titles are felt more or less in all the states. My attention was called to the subject near the close of the last session of the legislature of this state, with the request that I would assist in framing a statute which would remedy these evils; but before I was prepared to give advice on the subject the legislature adjourned, after passing an act which it is evident will not fully accomplish the purpose. Subsequent reflection and examination have led me to the conclusion that an adequate remedy for the evils may be found by using the *lien* of the state for taxes on the property sold. This *lien* is paramount to all others, and constitutes a valid first mortgage on the real estate, and the sale for taxes is in the nature of a proceeding to foreclose this mortgage.

No land can be sold at tax sales for less than the amount of taxes, costs, etc., due upon it, and a statute which declared that every sale of land for taxes which, from any cause, was invalid to pass the title of the owner, should operate as an absolute transfer to the purchaser of this *lien* or first mortgage of the state, and secure proper facilities for enforcing it, could not injure the state nor be unjust to the tax-payer; and it would give to the purchaser, where the tax itself was not illegal, a reasonable certainty of getting the property, or of getting back his money with the rate of interest allowed by law, in all cases except those in which property is sold which was not liable to taxation, or on which the tax had been paid, and in these cases the officer making the sale is, or ought to be, liable to the purchaser to the same extent as if the sale had been valid.

The statute should provide: 1. That the sale of land for taxes, if invalid to pass the title to the purchaser, should operate as an absolute transfer to the purchaser of the lien of the state, county, or municipality, on the property for the taxes, penalties, costs, etc., for which it was sold. 2. That whenever the title acquired by the purchaser at the tax sale was asserted in any court, to recover or defeat a recovery of the land described therein, and was found to be invalid, the court should at once proceed to ascertain the amount that was due to the state, county, or municipality, for taxes, penalties and costs on the real estate at the time of the sale, and for which it was sold; and also the amount of all taxes paid by the purchaser or those claiming under him since the sale, adding interest on these sums at a

rate fixed by law, and render judgment for the sum so found in favor of the party holding the tax title, and against the party whose title prevailed in the suit, to be enforced by execution and sale of the real estate, and with full costs if the amount found due had not been tendered before suit was commenced.

A notice appended to the complaint or declaration when the holder of the tax title was plaintiff, or appended to his plea or answer when he was defendant, that he claimed or defended under a tax title, describing it so as to identify it, would be sufficient "process of law" to uphold the judgment.

If the suit is in a common law court, a jury might be empannelled, if required by either party, to ascertain the amount due to the holder of the tax title under the lien; or in equity, it could be referred to a master.

In cases where the assessment was legal, there would be little difficulty in ascertaining the amount; where the defect was in the assessment, the amount of taxes really due could be readily ascertained, and to this should be added all costs and expenses which resulted from the failure of the owner to render a proper assessment.

With such an assurance of a certain return of their money with liberal interest, if the title acquired prove to be invalid, purchasers could readily be found for all property sold for taxes: the heavy penalties which bear so oppressively on the more worthy class of defaulting tax-payers would be unnecessary, and there would be no escape for those unwilling to pay.

Under this plan the purchaser would take no risk, except as to the legality of the tax; and in regard to the assessment, if that proved to be illegal, that the amount assessed was not in excess of the amount properly assessable on the property. On these points there would be ordinarily little difficulty in obtaining reliable information upon which a prudent business man would act without hesitation. To prevent the holder of a tax title who obtained possession, from being harassed by an amount of rents, income and profits in the event his title proved defective, it might be well further to provide that the holder of the state *lien* for taxes in possession, should not be liable to account for rents, income and profits, (except to the holder of a junior lien), unless the amount due him under the *lien* be first tendered to him, and then only from the time of such tender.

Such a statute would convert a tax title, if invalid to pass the fee into a first mortgage on unincumbered real estate, with a certainty of speedy foreclosure whenever its validity to pass the fee was successfully questioned. It would not be oppressive to the tax-payer, whose obvious duty it is to pay the taxes to the state, or to the purchaser who paid the taxes for him; in fact, it would benefit him, by enabling him to get back his property by redemption after sale on better terms, because the penalties and rate of interest could be reduced. It would only deprive him of the chance of escaping the payment of taxes through the invalidity of the sale; and it is no injustice to him to close that door.

The rate of interest which ought to be allowed to the purchaser, in the event of redemption, or in the event his title proved to be defective, ought to be sufficient to make investments in tax titles desirable to those who have money seeking investments; and in view of the uncertainty as to the time when the money would be refunded, and the impossibility of requiring interest to be paid at certain periods, it would probably be fair to allow double the ordinary legal rate; and the same rate of interest should be allowed on all taxes paid by the purchaser subsequent to the purchase. It would probably be well, also, for the statute to define accurately what estates are cut off by a tax title, or are subject to the *lien* of the state for taxes.

The *lien* for taxes, and a valid tax title, ought to be superior to any *lien* or incumbrance done, or suffered by the owner, or any remainder or reversion created by him; but it is clear that remainderers or reversioners who do not claim under the tenant of the particular estate, ought not to be cut off by his default. It might be sufficient to declare that the lien for taxes was binding upon, and that a valid sale to enforce it, cut off all estates or interest in the land, except remainders and reversions not created by the tenant of the particular estate.

The subject is one of great public importance in this state, and probably in many other states; and by publishing this article in the CENTRAL LAW JOURNAL valuable suggestions may be elicited from others whose attention has been called to the matter, and from the material thus prepared statutes may be framed by the legislatures of all the states where they are needed, which will effectually correct the evils resulting from defective tax titles.

D. S. TROY.

MONTGOMERY, ALA., September, 1877.

A CORRECTION.

DENVER, COL., September 17, 1877.

To the Editor of the Central Law Journal:

In the Abstracts of Decisions of the Supreme Court of Colorado, published in your journal of the 7th inst., on page 234, there occurred in the case of Tucker v. McCoy a clerical error, which, though obvious to those who examine the statutes, yet is one which I beg you to correct; because reports of judicial decisions, even in this condensed form, should be absolutely correct in every particular. The error was in giving the decision as based solely upon an act of Congress in regard to town sites of February 11, 1870. It should have been designated as an act of the Colorado Legislature of that date. There is no such act of Congress of the date named. The error occurred from the fact that the decision referred to was based upon several acts of Congress, and also several acts of the territorial legislature upon the same subject, and, in condensing the abstract, the one was by accident misstated for the other. While, for the sake of perfect accuracy, this correction should be made, it makes no difference in the value of the decision. The decision is in fact based upon an act of Congress, and also upon an act or acts of the territorial legislature which were made to execute the act of Congress. And wherever town sites have been located on public lands, there have been, doubtless, similar acts of the local legislature.

BEN LANE POSEY.

ABSTRACT OF DECISIONS OF SUPREME COURT OF WISCONSIN.

August Term, 1877.

HON. E. G. RYAN, Chief Justice.
" ORSAMUS COLE, } Associate Justices.
" WM. P. LYON, }

MASTER AND SERVANT.—If a servant, without consent of his master, engage in any employment or business for himself or another, which may tend to injure his master's trade or business, he may lawfully be discharged before the expiration of the agreed term of the service. This is true, notwithstanding the fact that the servant may have given his entire time and personal attention to the business of his master. Opinion by LYON, J.—*Dieringer v. Meyer.*

CONTRIBUTORY NEGLIGENCE — ACTION AGAINST

R. R. Co.—Where a railway company fences its road in a manner required by the statute, and such fence afterwards becomes defective, an action against the company for injuries to horses or cattle straying upon the railroad track through such defective fence, can not be maintained if it be made to appear that the negligence of the owner of the animals injured, contributed proximately to the injury. Brown v. Railway Co., 21 Wis. 39, so far as that case conflicts with the rule here adopted, *overruled*. Opinion by LYON, J.—*Jones v. The Sheboygan & Fond Du Lac R. R. Co.*

CHATTEL MORTGAGE—CLAUSE AUTHORIZING POSSESSION.—Where a chattel mortgage contains no other provision for the possession of the articles mortgaged, before maturity of the debt secured, than the clauses, that upon default at maturity the mortgagee may take possession and sell, and that if the mortgagee shall at any time deem himself insecure he may in like manner take possession and sell, the latter clause operates to vestan *absolute discretion* in the mortgagee. It was error to charge that the mortgagee could act upon the clause only in case he had *reasonable ground* for deeming himself insecure. Opinion by RYAN, C. J.—*Huebner v. Koebke.*

RIPARIAN RIGHTS—TITLE TO BED OF STREAM—WHAT ARE NAVIGABLE STREAMS.—1. Under the uniform decisions of this court, one who owns both banks of a stream, navigable or unnavigable, has title to the bed of the stream. 2. It is the settled law of this state that streams of sufficient capacity to float logs to market are navigable; and it is not essential to the public easement that this capacity be continuous throughout the year, but it is sufficient that the stream has periods of navigable capacity ordinarily recurring from year to year, and continuing long enough to make it useful as a highway. 3. If the capacity of the stream is such that it can be used as a highway without any trespass upon the banks, the right of the public therein is not affected by the fact that such trespass is convenient and habitual. 4. The right of A to float his logs down a navigable stream, unimpeded by the dam of B, is not affected by the lawfulness or unlawfulness of A's dam on the same stream. Opinion by RYAN, C. J.—*Olson v. Merrill.*

TITLE OF OWNEER OF LAND ABUTTING ON MEANDERED LAKE OR POND—RIGHT OF PUBLIC—ACTUAL WATER LINE THE BOUNDARY.—1. The owner of any land bounded by any meandered lake or pond in this state, takes, as such, no fee in the bed or soil under the water; but has a right to accretions formed by slow and imperceptible degrees upon or against his land, and to those portions of the bed of the lake or pond adjoining his land, which may be uncovered in the same manner by reliction of the water. The other rights, also, belonging to the riparian owner as such upon a *navigable* lake, belong to the riparian owner upon any meandered lake in this state, whether actually navigable or not, so far as they can be applied. 2. The riparian rights above defined are subject to the paramount right of the public to use navigable lakes or ponds for the purpose of commerce and navigation. 3. If the meandered line of a lake or pond differ from the actual water-line, the latter is the true line of a lot bounded in terms by the meandered line. Opinion by LYON, J.—*Boorman v. Sunnuchs.*

IT IS related of Chief justice Agnew, of Pennsylvania, that he was out after birds a few days ago and bagged two, whereupon he was arrested, dragged like a common lawbracker before a justice of the peace, and, despite his unquestionably truthful plea that he knew nothing of the statute against shooting game out of season, was fined $10 for each bird. The stern justice of the peace improved his golden opportunity to discipline his big legal brother.

ABSTRACT OF DECISIONS OF THE SUPREME COURT COMMISSION OF OHIO.*

Hon. LUTHER DAY, Chief Justice.
" JOSIAH SCOTT, } Associate Justices.
" D. T. WRIGHT, }
" W. W. JOHNSON, }
" T. Q. ASHBURN, }

LIABILITY OF BOARDS OF EDUCATION FOR NEGLIGENCE.—A board of education is not liable in its corporate capacity for damages for an injury resulting to a pupil while attending a common school, from its negligence in the discharge of its official duty in the erection and maintenance of a common school building under its charge, in the absence of a statute creating a liability. Judgment affirmed. Opinion by ASHBURN, J.—*Finch v. Board of Education of Toledo.*

CRIMINAL LAW — ERROR — FINAL JUDGMENT. — Where the court, on application of the defendant, who is indicted for a crime, continues the case to the next term of the court at his costs, and renders a judgment against him for the same, and orders execution for the same; a writ of error will not lie to reverse such judgment, until final judgment in the prosecution; and where the record does not show such final judgment the writ will be dismissed. Per Curiam.—*Cochrane v. State.*

CRIMINAL STATUTE AS TO PROMISSORY NOTES—REQUISITES OF INDICTMENT.—1. Under the Act of May 4, 1869 (660, L. 93), making it a penal offense to take a "promissory note or other negotiable instrument" not containing the words "given for a patent right," knowing the consideration thereof to be a patented invention, does not include in such offense the taking of notes or instruments not negotiable. 2. An indictment which does not show that the note or instrument on which it is founded was negotiable, does not show an offense under the act, and may be met by demurrer. Judgment affirmed. Opinion by DAY, C. J.—*State v. Brower.*

ERROR—FINAL ORDER—PARTIES TO APPEAL.—A ditch was established by county commissioners under the act of April 12, 1871, and, on appeal to the probate court, their action was approved and the ditch established by order of the court. On error to the court of common pleas, some of the grounds of error were found to be well taken and others not, but all the former proceedings were set aside, and the court then made an order, in accordance with the act of March 24, 1864, (S & S., 321) allowing the plaintiffs in error to show wherein they have been injured by the erroneous proceedings, but made no further order in the case. *Held*, that the same plaintiffs in error, no order or judgment having been rendered against them under the act, have no ground for prosecuting a petition in error in the district court, nor can they sustain such proceeding in error before the court of common pleas renders a final order or judgment against them in the case. Opinion by DAY, C. J.—*Cameron v. Workman.*

QUANTUM MERUIT—VARIANCE BETWEEN ALLEGATIONS AND PROOF—EFFECT OF WAIVER OF JURY.—1. A plaintiff may recover as upon an implied *quantum meruit*, for the value of services rendered under a special contract, which has been wrongfully terminated by the defendant. 2. Where an item of account on which suit is brought is not proved on the trial to the full extent claimed in the petition, but the variance between the allegations and the proof is not such as to

*The following are all the opinions filed by this court just before its adjournment for vacation, and not yet published. The Supreme Court and Supreme Court Commission will meet September 24th, and commence to file opinions about October 15th.

mislead the defendant in regard to the nature and character of the claim in controversy, such variance will not prevent a recovery, if the facts proved show a good cause of action. 3. Where a jury is waived, and issues of fact are submitted to the court, with a request to have the conclusions of fact found separately from the conclusions of law, a question as to the sufficiency of the evidence upon which findings of fact were made by the court, can only be raised by a bill of exceptions. Statements as to the grounds upon which conclusions of fact were based, can not, by being improperly incorporated into the findings of fact, be made part of the record. Judgment affirmed. Opinion by SCOTT, J.—*Ralston v. Kohl.*

PLEADING—LEGAL AND EQUITABLE DEFENSES—PRACTICE.—1. In an action to recover damages for cutting and carrying away timber from a certain described tract of land, two defenses were filed: 1. A general denial. 2. An equitable defense and cross-petition, in substance that the plaintiff had sold this land to defendant, and undertaken to convey the same, but by mistake the deed did not describe the tract, but another. The prayer was for the correction of the mistake, and for a proper conveyance. Issue was joined on this answer, which was tried by the court, (the issue made by the first defense being left undisposed of, without objection), and the equitable relief prayed for was granted, and the plaintiff appealed to the district court. *Held*, 1. That the issue on this second defense was purely equitable, and one to be tried by the court, and not by a jury; that on being determined in favor of the defendant, it constituted a bar to plaintiff's cause of action. 2. That it was proper for the court to dispose of this equitable defense before trying the case on the issue of law made by the first defense, and that final judgment against the plaintiff having been rendered on such equitable defense alone, the plaintiff was entitled to an appeal from such judgment. Judgment reversed. Opinion by JOHNSON, J. —*Sheeful v. Murty.*

CHARITABLE BEQUEST—SPECIFIC OBJECT.—A testator makes a bequest in trust for the benefit of his parents during their lives, and proceeds: "It is my will and desire that upon the death of both of my said parents the trust shall expire, and my said trustee shall distribute the funds as follows, to wit: as to the remaining sum of $3,000, the balance of said trust fund, my said trustee is directed to apply the same so that it may be used *for the interests of religion and for the advancement of the kingdom of Christ in the world* as follows: he shall pay to the treasurer of the American Tract Society $1,000; to the treasurer of the American Bible Society $500; to the treasurer of the society known as the American and Foreign Christian Union $500, and to the treasurer of the American Home Missionary Society $1,000." *Held*, 1, that the trust created by the will ceases upon the death of the parents, and payment of the money to the societies whose treasurers are named; 2, that the societies are the beneficiaries of the will, and the bequest is not void for uncertainty; 3, that the object of the testator being to advance Christ's kingdom, the societies named are specified as the means by which to accomplish his object; and 4, that an unincorporated society is capable of receiving a bequest of personalty, not amounting to a trust. Judgment reversed. Opinion by WRIGHT, J. —*American Tract Co. v. Atwater.*

JURORS—QUALIFICATION—COMPETENCY—WAIVER. 1. Jurors must have the qualification of electors; and when a person, not having such qualifications, is retained on the panel, without the knowledge of the party or his counsel, after reasonable diligence and due inquiry of the juror, at the time he is impaneled, to ascertain the fact of his competency, a new trial should be awarded. 2. When a party, at the time the juror is impaneled, fails to make any inquiry of the juror as to his competency, he, by such omission, waives all objection to the competency of such juror that could have been ascertained by such inquiry, except such as the court is required to ascertain *sua sponte*. 3. In order to take a case out of this general rule, it is not enough, on a motion for a new trial, based on the alleged incompetency of the juror arising from his minority, simply to show that the juror was a married man; was doing business for himself; had the appearance of being twenty-one years old; that the party was ignorant of his minority, and believed the juror, at the time he was impaneled, to be competent. 4. To allow a person to sit as a juror, incompetent as such because he is not an elector, who was not interrogated as to his competency when impaneled as a juror, and whose ineligibility was unknown to the court until advised of such fact on a motion for a new trial, is not such irregularity on the part of the court as will entitle the party to a new trial, when the officer calling him into the panel was guilty of no misconduct. Judgment affirmed. Opinion by ASHBURN, J.—*Watts v. Ruth.*

JUSTICE COURT—PRACTICE—JURISDICTION—TRANSCRIPT.—1. Where, in a civil action, before a justice of the peace, the return of the constable fails to show legal service of the writ of summons on the defendant, but such defendant, before the trial of the action, files with the justice a bill of particulars of his set-off in the action, this constitutes a voluntary appearance, and confers on the justice jurisdiction of the person of defendant. 2. Upon petition in error to reverse the judgment rendered in such action against the defendant, for want of jurisdiction of his person, such voluntary appearance can only be shown by a transcript of the proceedings and judgment from the justice's docket. The record can not be aided or varied by parol evidence. 3. Where defendant in error, by way of answer to the petition, alleges such voluntary appearance, and avers that the transcript upon which plaintiff has assigned error is imperfect and defective in failing to show the filing of such bill of particulars, such averments may be regarded as a suggestion of diminution of record, and would authorize the court to order the justice to furnish a complete and perfect transcript of the proceedings and judgment before him in the action. 4. Where, without such order or compulsory process, the justice, during the pendency of the proceedings in error, furnishes a complete and perfect transcript of the proceedings had before him in the action, duly certified to be a true copy from his docket, and, upon the hearing of the petition in error, such transcript is produced by the defendant and submitted to the court, without objection on the part of the plaintiff, the case may properly be heard upon such amended transcript, and determined accordingly. Judgment affirmed. Opinion by SCOTT, J.—*Godfred v. Godfred.*

JUDGMENT OF FOREIGN STATE—AUTHENTICITY OF —EVIDENCE.—1. In an action in this state on the record of a judgment of a sister state, which is duly authenticated as required by act of Congress of May 26, 1790, as the judgment of a court of record of such state, it is entitled to full faith and credit, if it appears that such court had jurisdiction over the subject-matter and the person, and that it is valid and conclusive in the courts of that state. 2. By a statute of the State of Pennsylvania, the prothonotary or clerk of a court of record is authorized and required, on application, to enter up judgments in vacation, on warrants of attorney on notes, bonds and other instruments of writing, for the amount which from the face of the instrument appears to be due, without the agency of an attorney

or declaration filed, which judgment must be entered on the docket, with the date and tenor of the instrument, and provides that they shall have the same force and effect as if a declaration had been filed and judgment confessed by an attorney, or as if obtained in open court and in term time. In an action on a judgment entered under the provisions of this statute, where the record of the proceedings is entitled and made up, as the record of the court at a term of such court next after such entry, the complete record of which is duly authenticated and certified as a true copy of the judicial proceedings of such court in the case, *held* that such judgment is entitled to full faith and credit in a sister state, though the transcript shows that it was rendered upon a confession before the prothonotary in the vacation prior to said term of court. 3. Under this statute it is not necessary, in order to authorize the prothonotary to enter up a judgment on such warrant of attorney, that there be a formal appearance of an attorney to confess the same, or that a declaration by the plaintiff be filed. If, however, an attorney, authorized by the warrant of attorney executed by the defendant, does appear and confess judgment against him, and at the same time as plaintiff's attorney files a declaration on which such judgment is confessed, the remedy of the defendant for such irregularity, if it be one under such statute, must be sought in the court where the judgment was rendered. Judgment reversed. Opinion by JOHNSON, J.—*Sipes v. Whitney.*

ACTION FOR OBSTRUCTING HIGHWAYS—PLEADING—JURISDICTION OF TRUSTEE—LIABILITY OF ONE WHO DIVERTS WATER FROM ITS NATURAL COURSE.—1. By section 32 of the act relating to roads, etc., (S. & S. 669,) township trustees are authorized to bring civil actions to recover the statutory penalty for obstructing and permitting obstructions to remain upon and across public roads or highways, authorized by the laws of this state, to the hindrance and inconvenience of travelers or other persons passing along or upon such public roads or highways. 2. The statute giving the cause of action confers jurisdiction over it upon justices of the peace. 3. In actions prosecuted under the provisions of this statute, where the obstruction is alleged to have been caused by a railroad car, or cars, or locomotive, it must be averred in the petition that the public road or highway was obstructed unnecessarily, by permitting such railroad car, or cars, or locomotive, to remain upon or across the public road or highway for a longer period than five minutes, to the hindrance, etc. In actions for obstructions to public roads caused by agencies other than railroad cars and locomotives, in describing the manner of the obstruction, the word "*unnecessarily*" forms no essential part of the description of the cause of action. 4. It is no valid objection to the jurisdiction of a justice of the peace in this class of cases, that, on the trial, the right of the public to the use of the roadway, as a public highway, may involve, to some extent, the title to the land at the place of alleged obstruction. As the statute confers original jurisdiction upon justices of the peace over the cause of action, by necessary implication it vests authority in justices' courts to hear and determine all questions necessary to render a final judgment. 5. The person who maintains a mill race, diverting water from its natural flow through the race to his mill, for private use, which mill race cuts and crosses a public road, previously established over his land, by authority of law, which race unbridged is an obstruction across the highway, to the hindrance and inconvenience of travelers and persons going along and upon such public highway, must place a sufficient bridge over the race at the point of obstruction, and keep it in repair, so that the highway will be as good and safe for public travel as before the race was constructed. Judgment reversed. Opinion by ASHBURN, J.; JOHNSON, J., dissenting.—*Burton, Tp. v. Tuttle et al.*

ABSTRACT OF DECISIONS OF SUPREME COURT OF KANSAS.

July Term, 1877.

HON. ALBERT H. HORTON, Chief Justice.
" D. M. VALENTINE, } Associate Justices.
" D. J. BREWER, }

EVIDENCE.—It is error for a court, on the trial of a case, to permit *a copy* of an instrument in writing to be introduced in evidence, unless it is shown that the original is lost or destroyed, or placed beyond the reach of the party introducing the evidence; and where the verdict of the jury and the judgment of the court are founded upon such evidence, the error is material and substantial. Opinion by VALENTINE, J. Brewer, J., concurring. Horton C. J., not sitting in the case, having been of counsel in the court below. Reversed. —*The City of Waterville v. Hughan and McDowall.*

PLEADING AND PRACTICE.—Where a plaintiff, in an action on a note and mortgage, sets forth in his petition, that S., one of the defendants, who did not execute said note or mortgage, claims to have some interest in the mortgaged property, but that whatever interest he may have therein, it is junior and inferior to the mortgaged lien; and S. answers, setting forth in his answer in detail, that he is the absolute and exclusive owner of the mortgaged property, showing how he became the owner thereof; that the mortgagors never had any interest in the mortgaged property, and, therefore, that the mortgage is void, as against him; and no reply is filed by the plaintiff to this answer, and the court, on motion of the plaintiff, rendered judgment on the pleadings in favor of the plaintiff and against all the defendants: *Held*, that said judgment is erroneous as against S. Opinion by VALENTINE, J. All the justice concurring. Reversed.—*Scott v. Morning.*

VENDOR'S LIEN.—1. A judgment on an ordinary promissory note given for the purchase-money of real estate, declaring that the debt is a lien on such real estate, and ordering that the same be sold to satisfy such debt, is erroneous; and it makes no difference whether such real estate is occupied as a homestead or not. The judgment in such a case should be an ordinary personal judgment against the defendant, for the amount of the note and costs, authorizing an ordinary execution to be issued against the property, in general of the judgment-debtor, subject to execution; and on such an execution the officer, after exhausting the personal property of the judgment-debtor subject to execution, might levy on such real estate (or on any other real estate of the judgment-debtor subject to execution), whether the real estate first mentioned were occupied as a homestead or not. Opinion by VALENTINE, J. All the justices concurring. Reversed.—*Greene v. Barnard.*

PARTNERS.—1. Where P. and H. have a conversation about forming a co-partnership, but do not enter into any agreement with reference thereto, P. can not afterwards, without the knowledge and consent of H., contract a debt or obligation in the name of P. & H., and thereby make H. responsible for such debt or obligation. 2. And where such conversation has been had between P. & H., and such debt or obligation has afterwards been contracted by P., in the name of P. & H., without the knowledge or consent of H., and P. & H. afterwards form a co-partnership under the name of P. & H., and H. still has no knowledge that such debt

or obligation was contracted, but sometime after forming such partnership he obtained such knowledge: *Held*, that he will still not be liable for such debt or obligation, unless after forming such partnership he does something, from which it may be inferred that he intends to assume, or that the partnership shall assume, such debt or obligation. *Held*, under the facts of this case, as found by the jury, that H. was not liable. Opinion by VALENTINE, J. All the justices concurring. Affirmed.—*Gauss & Sons v. Pope & Hobbs.*

WHEN THE PROMISE TO PAY ANOTHER'S DEBT IS NOT WITHIN THE STATUTE OF FRAUDS—MONEY IN HANDS OF AN AGENT LIABLE TO BE GARNISHEED FOR THE PRINCIPAL'S DEBT.—1. A promise made to a debtor, for a valuable consideration, to pay his debt to a third person, is not a promise to answer for the debt of another person, within the statute of frauds, which applies only to promises made to a creditor, and such a promise need not be in writing. 2. Where a principal places money in the hands of his agent to pay a debt, due from him to another person, and such other person at the time has no knowledge of the direction and acts of the principal, and the agent, while on his way to make the payment, is duly garnisheed at the instance of certain judgment-creditors of his principal: *Held*, that thereafter the said money is liable to be applied under the proceedings of garnishment, to satisfy the claims of judgment-creditors, and after such garnishment the agent is not liable for said money to the person to whom he was directed by his principal to make the payment thereof. Opinion by HORTON, C. J. All the justices concurring. Reversed.—*Cuten v. McQuesten.*

EJECTMENT—PLEADINGS—EVIDENCE.—1. In action for the recovery of real property, it is sufficient in the defendant to deny generally the title alleged in the petition. Gen. Stat. p. 748, § 596. And under such a denial he may prove any fact tending to show that plaintiff has not the title or the right of possession. 2. While such a denial is sufficient, the defendant may, if he prefer, set out fully and specifically the facts constituting his defense, and then his answer is to be governed by the ordinary rules of pleading. 3. Where evidence offered is *prima facie* irrelevant, the court may require the party offering it, to show its relevancy by connecting it with other facts, and upon his failure to do this properly, reject it; but where it is pertinent, though insufficient, it should as a rule, be received. 4. To determine the pertinency and revelancy of testimony offered, reference must be had to the pleadings; and while these are no longer, except in special cases, required to be verified, they are still the professional statements of counsel of the claims of their clients and the matter they expect to prove. Opinion by BREWER, J. All the justices concurring. Reversed.—*Wicks v. Smith.*

PREFERENCE OF ONE CREDITOR OVER ANOTHER BY AN INSOLVENT DEBTOR.—In an action where it was shown that Harris sold certain property to Somerville, and Somerville sold it to Eastes for $250, of which $185 was paid in Dodson's notes (payable to Eastes), $65 in Eastes notes (payable to Somerville) and Harris was present at the time of the sale from Somerville to Eastes, and Somerville, at the time of said sale, handed said Dodson notes to Harris, and Harris handed them to his wife, and his wife afterwards with the consent of Dodson, paid $185 of debt due from Harris to Dodson, by delivering said Dodson notes to Dodson, and Estes, at the time of the sale to him, "knew Harris was indebted to Dodson about $200, and believed that the Dodson notes which he gave Somerville were to be turned over to Harris by Somerville, and by Harris to Dodson," and the defendants in the action claimed, that said sales from Harris to Somerville and from Somerville to Eastes, were made with the intention of defrauding Harris' creditors: *Held*, that the following instruction given by the court to the jury was not erroneous, as against the defendants, to wit: "If the jury believe from the evidence, that Harris sold the property in question in good faith to pay any particular creditor of his, to the exclusion of others, without an intention to defraud, but simply to prefer one creditor to another, although the plaintiff (Eastes), may have had full knowledge of such intent on the part of Harris, it would not vitiate the purchase of Eastes, the plaintiff." Opinion by VALENTINE, J. All the justices concurring. Affirmed.—*Avery v. Eastes.*

CONTRACT FOR A RIGHT OF WAY—DAMAGES FOR BREACH THEREOF. 1. Where the petition sets out the execution of a written agreement between the J. C. & F. K. Railroad Co., and a land owner, for a right of way for a railroad through the latter's premises, upon the condition that the said railway company should construct a side track, depot and station buildings on the premises of the land owner, and furnish to such person Osage orange plants to fence the railway, and also pay him for growing the fence, when sufficient to turn stock; the assumption of the obligations therein created against the J. C. & F. K. Railway Co., by the K. P. Railway Co., the fact that the only consideration moving the land-owner to part with his land for such right of way, was the concurrent agreement of the railway company; the entry and possession of the two corporations upon the premises of the land owner, in pursuance of the agreement, and the continued use and occupation of the same for a right of way by the K. P. Railway Co.; the failure and refusal of either company to perform any of the said agreements contained in the contract; the damage occasioned by such failure, and the demand of judgment. *Held*, that sufficient facts are therein set forth to constitute a cause of action against the K. P. Railway Company. 2. Where, in such an action as above stated, the two railway companies are impleaded together, but a demurrer to the evidence is sustained as to the J. C & F. K. Railway Co., and thereafter the cause is prosecuted against the K. P. Railway Co. only, the election of the latter company implies an abandonment of the former, and the action against the K. P. Railway Co., is maintainable on the rule that the promise of the K. P. Railway Co. to the J. C. & F. K. Railway Co., made upon a valid consideration, and having been adopted by the land owner, is to be deemed as made to him, though he was not a party nor cognizant of it when made. Anthony v. Herman, 14 Kas. 494. 3. Where a land owner consents that a railway company shall take possession of a right of way for its railway, on and through his lands under a written agreement, conditioned that the company should within a given time construct a side track, depot and station buildings on the premises of the land owner, and furnish hedge plants to fence the railway, and pay the land owner for growing the hedge, and such railway company takes possession under the agreement, obtains the right of way thereby, and continues to use and occupy the premises of the land owner for such purpose, and fails and refuses to comply with the terms of the agreement, upon which it made entry, took possession and acquired the right of way: *Held*, that the land owner can at once, upon breach of the contract, have recourse to the district court for his damages against the railway company, and need not resort to the tribunal prescribed by the statute to have his damages assessed for the right of way. Opinion by HORTON, C. J. All the justices concurring. Affirmed.—*The Kansas Pacific Railway Company v. Hopkins.*

KNOWLEDGE OF AN OFFICER OF A CORPORATION NOT ALWAYS NOTICE TO THE COMPANY—RECORDING INSTRUMENTS NOT CERTIFIED—ABANDONMENT OF LEASE—ESTOPPEL.—1. The general superintendent of a zinc and manufacturing corporation conveyed to such corporation by a general warrantee deed certain lands, to which W. & K. not being in possession, asserted some claim by virtue of a written lease from a prior vendor; of this lease said superintendent had actual notice when he purchased the said premises in his own interest, and said lease was also recorded in the office of the register of deeds, of the county where the land was situated, but was not acknowledged and certified as required by sections 9, 11 and 12, of the act regulating conveyances. Gen. Stat. 1868, 184. *Held*, that the general superintendent having acted in the transaction not for the corporation, but for himself, his knowledge of the lease to W. & K., is not the knowledge of the corporation and can not affect its rights, unless shown to have been communicated to it, or unless such facts had been presented to it to have put the corporation on inquiry; and *held*, that the provision of § 20, Gen. Stat. 1860, 187, to the effect that the filing of written instruments with the register of deeds for record, imports notice to all parties and persons of the contents thereof, applies to such instruments only as are certified in the manner prescribed by the act relating to conveyances. 2. Where W. & K., on November 2d, 1872, executed a written lease with one W., whereby they could mine coal on W.'s land for a term of twelve years, which term was to commence January 1st, 1873, and were to pay W. as rent for the land and right to mine coal one-half cent for every bushel mined, to be paid monthly, and the lease stipulated that W. & K. should have the right to commence mining coal at any time, and W. & K. agreed to do so as early as they could make the necessary preparations, and said W. & K. having done nothing under the lease, refused to answer W., who wrote them in the spring of 1873, what they intended to do as to mining coal on his premises, and W. in a few weeks thereafter sent a letter to the address of W. & K. cancelling the lease, and thereafter W. & K. took no other steps to mine the coal on the premises or to commence work therefor, but to make inquiry as to the cost of mining and loading coal at said premises on the cars, until June, 1874, when they sent their agent with a laborer to mine and to make demand for the premises if forbidden to work, and at this time said premises were owned and in the possession of a zinc and mining corporation, under a purchase of October 23d, 1873, and which corporation, with the knowledge of W. & K., and without objection from them, or any assertion of W. & K.'s claim thereto, had expended $65,000 on the premises in the construction of extensive mining works. *Held*, that said W. & K. were by the terms of said lease, the notices of the lessor, and their own acts and conduct, estopped from asserting against said zinc and mining company any rights under the lease, or possession of the premises, or any claim for damages. Opinion by HORTON, C. J. All the justices concurring. Affirmed.—*Wickersham & Keith v. The Chicago Zinc and Mining Company.*

QUERIES AND ANSWERS.

6. KANSAS CHATTEL MORTGAGES.—A mortgages a span of horses to B. By the law of this state, a chattel mortgage is void as against creditors and subsequent purchasers in good faith, unless an affidavit is filed by the mortgagee, showing amount yet due, within thirty days next preceding the expiration of one year from filing of mortgage in office of register of deeds. After one year from said filing, and prior to filing, any affidavit, A trades the horses to C, who becomes *bona fide* holder. It is clear that if A still owned said horses' B could take them under his mortgage. Now, then, can B have any relief in equity to obtain a lien on the identical property A obtained from C, provided he can show that fact and A still holds property?

NOTES.

GEN. MCCLELLAN has been nominated by the democrats as their candidate for governor of New Jersey. The dispatches do not state when the campaign is to open; but it is expected that he will break up camp and advance as soon as the roads get dry.

AN exchange says: "The English Court of Divorce grants a divorce to a man on the ground of his wife's adultery, but does not grant a divorce to a woman on the score of her husband's adultery, unless coupled with cruelty or desertion; but proof of the husband's adultery will procure for the wife a decree of judicial separation from him. The court, however, comprehends, under the term "cruelty," the wounding of the feelings of a wife. In framing this law, the legislature no doubt had in view the same sentiments which Dr. Johnson enunciated, when he said: "Confusion of progeny constitutes the essence of the crime; and therefore a woman who breaks her marriage vow is much more criminal than the man who does it. A man, to be sure, is criminal in the eye of God; but he does not do his wife a very material injury, if he does not insult her. A wife should study to reclaim her husband by more attention to please him. Sir, a man will not, once in a hundred instances, leave his wife for another, if his wife has not been negligent of pleasing."

ON the Norfolk Circuit Court, Lee was once retained for the plaintiff, in an action for breach of promise of marriage; when the brief was brought him, he inquired whether the lady for whose injury he was to seek redress, was good-looking. "Very handsome, indeed, sir!" was the assurance of Helen's attorney. "Then, sir," replied Lee, "I beg you will request her to be in court, and in a place where she can be seen." The attorney promised the compliance; and the lady, in accordance with Lee's wishes, took her seat in a conspicuous place. Lee, in addressing the jury, did not fail to insist with great warmth on the "abominable cruelty" which had been exercised towards "the lovely and confiding female" before him, and did not sit down until he had succeeded in working up their feelings to the desired point. The counsel on the other side, however, speedily broke the spell with which Lee had enchanted the jury, by observing that his learned friend in describing the graces and beauty of the plaintiff, had not mentioned one fact, namely, that the lady had a *wooden leg!* The court was convulsed with laughter, while Lee, who was ignorant of this circumstance, looked aghast; and the jury, ashamed of the influence that mere eloquence had had upon them, returned a verdict for the defendant.

A CORRESPONDENT of the N. Y. *Tribune* writes: "In Windsor (Vt.) live, side by side, in the summer season, two great New York lawyers. One of them, Mr. Evarts, finds small time to enjoy his country home since he has taken up the heavy burdens of a cabinet portfolio. The other, Mr. E. W. Stoughton, spends eight or ten weeks of every summer in a spacious mansion, whose large, high rooms, broad verandas and ample grounds and gardens, tell of coolness and repose and a generous hospitality. Mr. Evarts owns three houses. The one he occupies is a white frame house of moderate size, with green blinds, and the bright, fresh, neat air, common to New England village dwellings of the better class. A thick growth of pines and maples quite screens the front from the street. The prettiest feature of the place is a close shaven lawn, sloaping abruptly down to a little valley, and covered with a turf so soft and dense and of such a vivid green that it must be the special pride of its owner. Mr. Evarts indulges in the rather expensive luxury of a farm, while Mr. Stoughton is content with three acres. The two neighbors and their families are on the most friendly terms, and with their guests, of whom they have usually an abundance, for they are too hospitable to enjoy their summer leisure alone, they make a delightful little society."